REPORTS OF CASES

DECIDED BETWEEN

MAY 15, 1971 and FEBRUARY 18, 1972

IN THE

Supreme Court of Nebraska

JANUARY TERM 1971, SEPTEMBER TERM 1971,
AND JANUARY TERM 1972

VOLUME CLXXXVII

H. EMERSON KOKJER

OFFICIAL REPORTER

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By H. Emerson Kokjer, Reporter of the Supreme Court
For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1971

STATE OF NEBRASKA, APPELLEE, v. WILLIAM RALPH HOLLOWAY, APPELLANT.
187 N. W. 2d 85

Filed May 21, 1971. No. 37356.

1. **Criminal Law: Searches and Seizures: Affidavits.** In passing on the validity of a search warrant, the court may consider only information brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. Affidavits for search warrants must be tested in a common sense, realistic fashion.
2. ———: ———: ———. A recital of some of the underlying circumstances in the affidavit for a search warrant is essential if the magistrate is to perform his detached function. Mere affirmance of belief or suspicion is not sufficient.
3. **Criminal Law: Searches and Seizures: Trial: Evidence.** The State has the burden of establishing the legal sufficiency of a consent to a search and seizure. The existence and voluntariness of a consent is a question of fact.
4. **Criminal Law: Searches and Seizures.** A consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search and seizure.
5. ———: ———. Under the circumstances of this case, the defendant had no standing to challenge the legality of the search and seizure.
6. **Criminal Law: Witnesses: Constitutional Law.** In order to deny a claim to the privilege against self-incrimination by a witness,

it must be perfectly clear to the judge from a careful consideration of all of the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

A. Q. Wolf and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

MCCOWN, J.

A jury found William Ralph Holloway guilty of the robbery of a bartender at a tavern in South Omaha, Nebraska. He was sentenced to 10 years imprisonment and this appeal followed.

At approximately 9 p.m., on December 13, 1968, three negro males held up and robbed the bartender and patrons of Little Paul's tavern. The robbers used a sawed-off shotgun and handguns and departed with money and personal effects, including men's and women's billfolds.

The robbery was one of a series of robberies which had occurred in Omaha. The police had been investigating the former robberies on December 12, 1968, and again on December 13, 1968. The police believed that following a robbery, the robbers might go to a brick dwelling at 5425 South 29th Avenue, which was the residence of Christabelle Jenkins.

At approximately 4 p.m., on the afternoon of December 13, 1968, Sgt. Barrett executed a sworn affidavit for the issuance of a search warrant for a 12-gauge sawed-off shotgun, assorted pistols and handguns. The affidavit alleged that the sole and only reasons for his belief that the guns were concealed or kept on the described premises was "information received from an

informant whose information has been reliable in the past." The judge of the municipal court issued a search warrant for the described property, reciting that "the following grounds exist for issuance of a search warrant, to-wit: Reliable information received from an informant whose information has been reliable in the past."

At approximately 6 or 7 p.m., the police began surveillance of the residence of Christabelle Jenkins from a distance of a half block. At approximately 9:15 p.m., the officers in the car heard a police radio report of a robbery at Little Paul's tavern. They left the residence for 15 or 20 minutes. Shortly after the return of the police officers to the front of the Jenkins residence, two negro males came out of the house. They were arrested by other officers some 300 feet east of the residence. The police, with their search warrant, went to the door of the residence. A 15-year-old son of Mrs. Jenkins came to the door. The police showed him the search warrant and he let them in. As they entered, they met the defendant coming down the stairs. He was arrested on the spot. In the front upstairs bedroom, lying on the bed, was a sawed-off shotgun, assorted cards and papers, men's billfolds and ladies' billfolds and purses.

Mrs. Jenkins lived in the house with her four children. She was the sole tenant and they were the only persons who lived in the house. Sgt. Coleman of the police department had been acquainted with her all of her life.

Mrs. Jenkins was not at home at the time the defendant was arrested. She was found at the Workmen's Club. Sgt. Coleman, together with Sgt. Dailey, left the Jenkins house and went to the Workmen's Club. There in the manager's office, Coleman testified that he told her that he had a search warrant for her house and he thought she should come with them. She said he didn't need anything to search her home; that she was willing to let them search. She did not remember whether they had told her they had a search warrant or not.

She rode with the police officers to her home and when they got there, she invited Coleman and Dailey into the house. She told them that she wanted to cooperate. When they entered the home, other policemen were still there. Sgt. Coleman showed Mrs. Jenkins the items on the bed in the upstairs bedroom. She told the police to take whatever was there. Neither the defendant nor the other two men arrested had ever lived in the Jenkins house. One of them had never been in the house before. The defendant had frequently visited her home but she had not given him permission to enter her home at any time that day. There was no evidence as to how the defendant or the other men entered the house.

A motion to suppress the evidence seized in the Jenkins bedroom was heard prior to trial and was denied by the district court. The defendant was found guilty by the jury. He was sentenced to 10 years imprisonment.

The defendant contends that the motion to suppress the seized evidence should have been sustained. He argues first that the search warrant was invalid because the affidavit was unsupported by facts. The State apparently takes the position that all the factual information which the police had might possibly have been submitted to the magistrate outside the affidavit, and, therefore, probable cause should be assumed from the issuance of the warrant.

We think it only necessary to refer to section 29-814, R. R. S. 1943: "A warrant shall issue *only on affidavit* sworn to before the judge or magistrate and *establishing the grounds* for issuing the warrant. * * * It (the warrant) shall state the *grounds* or proper cause for its issuance and the name or names of the persons whose *affidavits* have been taken in support thereof." (Emphasis ours.)

The rule in this state is clear. In passing on validity of a search warrant the court may consider only in-

formation brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. Affidavits for search warrants must be tested in a common sense, realistic fashion. State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21; State v. Waits, 185 Neb. 780, 178 N. W. 2d 774.

The affidavit here recited a bare conclusion. It recited none of the underlying circumstances from which either the informant or affiant had concluded that the shotgun and handguns were located in the residence of Christabelle Jenkins. Neither did the affidavit reveal any of the underlying circumstances from which the officer making the affidavit concluded that the informant was credible or reliable. While it is not necessary that the informant be named, it is necessary that some facts going to establish probable cause be set out. Affidavits for search warrants must be tested in a common sense, realistic fashion. Nevertheless, a "recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684.

Even if the police collectively may have had sufficient facts to constitute probable cause, none of these underlying circumstances were set out in the affidavit. The inevitable consequence is that the affidavit was insufficient and the search warrant invalid. As long ago as 1933, Mr. Justice McReynolds, speaking for the Supreme Court, said: "Mere affirmance of belief or suspicion is not enough." Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159.

We do not agree with the defendant that the invalidity

of the search warrant in and of itself automatically makes the evidence seized inadmissible. We believe the evidence establishes a valid consent by the person who had a full right to consent and also establishes the defendant's lack of standing to complain.

We recognize that the State has the burden of establishing the legal sufficiency of a consent. Nevertheless, the existence and voluntariness of a consent is a question of fact. Here Christabelle Jenkins, the only proper person from whom a consent could be appropriately obtained, had known Sgt. Coleman all of her life. She did not even remember whether Sgt. Coleman had told her that he had a search warrant. Sgt. Coleman testified that when he told her he had a search warrant, she advised him he didn't need anything, and that she was willing to let him search her home. She told Coleman she wanted to cooperate and she invited Coleman and Dailey into the house when they arrived.

Even if there were a question as to the timing of the consent compared with the time of initial entry into the house, there can be no question whatever that Mrs. Jenkins specifically authorized and directed the police to seize and take the articles found in a bedroom of her home. A consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search and seizure. See Maxwell v. Stephens, 348 F. 2d 325 (8th Cir., 1965).

There is no evidence as to how this defendant or either of the other two men got into the house nor as to who brought the articles into the home in the first place. If the consent of Christabelle Jenkins here were held ineffective, it would necessitate holding that the defendant was the only person who could validly consent to a search and seizure of articles found in a house other than his own, where he had no possessory or proprietary interest in either the real property searched or the personal property seized, and no reasonable expecta-

tion of personal privacy from governmental intrusion. We find no support for such a position.

The issue of standing here is inevitably wound up in the issue of consent. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, in effect, extended standing to challenge legality to "anyone legitimately on premises where a search occurs * * *." In Mancusi v. DeForte, 392 U. S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154, the Supreme Court held that standing "depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." We cannot believe that in either Jones or Mancusi the court intended to extend standing to an interloper or trespasser, nor to one who should have had no reasonable expectation of privacy for himself in the particular area of the "house" involved. Emphatically this is so where the search and seizure involved articles and personal effects which were not the defendant's, but were instrumentalities or fruits of a crime with which the defendant was charged.

Under the facts here, we believe that there was a voluntary valid consent by the proper person, and that the defendant had no standing to challenge the legality of the search and seizure involved.

The defendant also asserts that the court erred in permitting the defense witness, Willie Joseph, to invoke the Fifth Amendment privilege against self-incrimination in response to questions designed to elicit that the witness had pleaded guilty to this particular robbery on the preceding day. The record does not show that a conviction had been entered by the court nor that there were no other charges or counts pending against the witness arising out of this robbery or connected matters.

Under the rule of Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653, it "must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the an-

swer(s) cannot possibly have such tendency to incriminate." Doubts should be resolved in favor of the witness. The court's action in sustaining the witness' claim of privilege was correct.

The defendant also contends that the court erred in permitting the State to elicit from the defendant on cross-examination, over defense objection and motion for mistrial, the nature of the crime, the date of the conviction, and the sentence received by the defendant on a prior felony conviction. The fact of a prior conviction had been admitted by the defendant on direct examination. In a series of questions and answers extending over more than a page of the record, the State was allowed to elicit, over vigorous objection and a motion for mistrial, the fact that the defendant was convicted of manslaughter in 1963, and that he was sentenced to 4 years imprisonment, the jury being cautioned by the court to disregard the testimony that he was sentenced to 4 years imprisonment. Evidence of prior crimes is ordinarily inadmissible against the defendant. Section 25-1214, R. R. S. 1943, permits an exception as to witnesses generally, but the exception is strictly limited. See Latham v. State, 152 Neb. 113, 40 N. W. 2d 522.

The court is evenly divided as to whether the cross-examination here was harmless or prejudicial error. Under such circumstances, the judgment of the district court must be affirmed.

AFFIRMED.

CARTER, J., not participating.

WHITE, C. J., concurring in result.

I concur in the result reached in this case. The defendant had no standing to raise the issue of the sufficiency of the affidavit of probable cause upon which the search warrant was issued. That portion of the opinion containing a discussion and holding that the affidavit of probable cause was invalid is pure dictum. As such, it is not binding on the court, in my opinion, and

can only serve to becloud similar issues in future cases. The broad principles governing such cases have long since been announced. In my opinion, shadows have been cast upon the validity of the breadth of the holdings in United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684, and the following case of Aguilar v. United States, 363 F. 2d 379, cert. den., 388 U. S. 921, 87 S. Ct. 2119, 18 L. Ed. 2d 1369. Factual color matching of these cases is almost impossible. I feel that necessary steps to do so should be avoided as they would becloud the clarity of approach in future cases. As de Tocqueville reminded us in his classic statement on judicial power when a court goes beyond the necessary pronouncements of the law in the special cases before it, it may perhaps assert a more important influence than that of the judge, but it ceases to represent the judicial power. See, I de Tocqueville, Democrary in America, Judicial Power in the United States, p. 94.

EMIL C. WEBBER, APPELLANT, V. RICHARD A. ANDERSEN ET AL., APPELLEES.
187 N. W. 2d 290

Filed May 21, 1971. No. 37730.

1. **Common Law: Torts: Municipal Corporations.** The common law rule of governmental immunity has not been completely abrogated in this state by judicial pronouncement.
2. **Arrest: False Imprisonment: Municipal Corporations: Libel and Slander.** Actions at law for false arrest, false imprisonment, and libel and slander remain subject to the defense of governmental immunity.
3. **Torts: Pleading.** A general demurrer to a cause of action for negligence must be based on a pleading of facts and not on mere allegations of conclusions of law.
4. **Public Officers and Employees: Municipal Corporations: Negligence.** Public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them, unless the superior

officer has directed or encouraged or ratified such acts, or has personally cooperated therein.

5. **Statutes: Public Officers and Employees: Municipal Corporations: Negligence.** Section 14-605, R. R. S. 1943, was passed for the specific purpose of giving to chiefs of police the powers and responsibilities to enforce the law as that given to sheriffs. It was not for the purpose of making the chief of police liable for the acts of subordinate policemen.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed in part, and in part reversed and remanded.

John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Robert L. Berry, and William Lamson, Jr., for appellee Andersen.

Herbert M. Fitle, James E. Fellows, and John Abbott, for appellee City of Omaha.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

CARTER, J.

The plaintiff, Emil C. Webber, brought this action in tort to recover damages sustained while confined in the jail of the defendant City of Omaha. The defendant Richard A. Andersen was the chief of police of Omaha and, as such, the senior officer in command of the police department of the City. It is alleged that the police department maintained and controlled the city jail and that its police officers arrested, jailed, and supervised the confinement of the plaintiff in the city jail during the times involved in this action. The City demurred generally to plaintiff's amended petition. The demurrer was sustained and the cause dismissed as to the City. Defendant Andersen moved for summary judgment by his separate motion for summary judgment which was sustained and the amended petition of plaintiff was dismissed as to Andersen. Plaintiff has appealed from the

dismissal of the action as to the City and the grant of summary judgment in favor of Andersen. It will be noted as a matter of clarification that the sustaining of demurrers to the petition as to the defendants Scarpino, Laverty, Abbott, Hammann, Lindblom, Johnson, and Ward have not resulted in the entry of final orders as to them and, consequently, they are not involved in this appeal. By stipulation, the issues as to the City and Andersen were joined in this appeal.

The petition alleges that on or about June 5, 1968, at 12 o'clock midnight, plaintiff was taken into custody without cause and against his will by named police officers of the City of Omaha and conveyed to police headquarters where he was arrested. It is alleged that defendant Andersen was the chief of police of Omaha and the defendant Scarpino a supervisory officer in charge of the patrol officers who picked up the plaintiff and brought him to police headquarters. A judgment was prayed for on the foregoing allegations for false arrest.

In addition to the foregoing, the petition alleges that plaintiff was lodged in jail by defendant policemen where he was held for 5 hours. The cell in which he was placed was already occupied by three belligerent and intoxicated inmates. Defendants Andersen and Scarpino were supervisory officers in charge of the patrol officers and jailers. Plaintiff seeks a judgment against Andersen for false imprisonment.

It is also alleged by plaintiff, in addition to the foregoing, that he was placed in a cell with three intoxicated and rebellious persons who beat him up causing permanent injuries, including the loss of an eye, which will disable, disfigure, and cripple him for the balance of his life. He demands judgment for damages for negligence against the City of Omaha, Andersen, and others, for a substantial amount.

And, lastly, plaintiff alleges that he was logged in, booked, and charged with drunkenness and disorderly

conduct, which charges were without cause or foundation, and constitute a libel and slander against his reputation and person and for which he seeks damages.

To the foregoing petition, the City of Omaha demurred for the reason that the petition does not state facts sufficient to constitute a cause of action and for the further reason that the City is a municipal corporation and, as such, within the doctrine of governmental immunity from suit. It is the sustaining of this demurrer and the resulting dismissal of the action as to the City that affords the basis of this portion of the appeal.

The controlling issue between the plaintiff and the City is the applicability of the governmental immunity doctrine. The parties cite Brown v. City of Omaha, 183 Neb. 430, 160 N. W. 2d 805, and Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N. W. 2d 286, in support of their respective positions.

In the Brown case, this court held that it has the power to amend the doctrine of governmental imunity in the absence of legislative action to the contrary, recognizing that the legislative process and procedures can be more effectively applied to a comprehensive solution while the court's processes are more effective when directed to specific facts in litigated cases. It suggests a transition by a gradual judicial change by the process of inclusion and exclusion, case by case, and step by step. As a part of this process, the court holds that cities and other governmental subdivisions are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles, and nothing more. At the same time, the court recognizes the superior power and right of the Legislature to legislate on the subject.

In the Johnson case, the court reaffirmed its position in the Brown case in regard to its relation with the Legislature on the question of governmental immunity. In holding that governmental immunity was not a defense in a suit against the Municipal University of Omaha in a case where a pole vaulter was injured when

he fell upon a wooden box which had been negligently placed by the defendant beneath the pole vault standards, the court said: "We now hold that cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended."

In other words, the Brown case holds that governmental immunity is not a defense by a governmental subdivision from tort liability arising out of the ownership, use, and operation of motor vehicles. In the Johnson case, governmental subdivisions are held not to be immune from tort liability arising out of a physical condition affirmatively and voluntarily created on its premises where the condition is not reasonably visible or apparent and creates a risk of harm to persons reasonably using the premises for the purpose intended. This generally denotes the extent of the inroads upon the governmental immunity doctrine permitted by this court by its inclusion and exclusion, case by case, and step by step transition.

It is quite apparent that this court has not wiped out the full scope of the doctrine of governmental immunity. It has attempted only to eliminate governmental immunity in certain areas and then only until such time as the Legislature occupies the field. This court has not eliminated governmental immunity as a defense in actions for false arrest, false imprisonment, and libel and slander. The defense of governmental immunity from actions for negligence has been abrogated in certain types of negligence cases as we have heretofore described. But the legal policy declared appears to be a checkered one intended to fill the void existing prior to legislative action.

We are therefore faced with the problem whether or not the abrogation of the doctrine of governmental immunity should be extended to actions for false arrest, false imprisonment, and libel and slander. We have no decisions of this court that indicate that governmental immunity was to be abrogated as to such actions. Previous cases in which governmental immunity has been denied as a defense bear no resemblance to the three causes of action here being discussed. We conclude that governmental immunity should be, and is, a defense to these types of action. We are influenced by the fact that this is the proper public policy to be adopted because of the enactment in 1969 by the Legislature of a Political Subdivisions Tort Claims Act prohibiting tort claims "except to the extent, and only to the extent, provided by this act," and providing that it "shall not apply to * * * Any claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." See §§ 23-2401 and 23-2409(5), R. R. S. 1943.

By his third cause of action, plaintiff alleged negligence in the following respects: That plaintiff was placed in a cell already occupied by three drunken and belligerent inmates by policemen-jailers when they knew or should have known he would be in danger of physical assault and injury; in the failure to remove plaintiff from the cell after he informed them of his fear for his personal safety; in the failure of the jailers to protect him from the attacks of the other inmates of the jail cell; in failing to place plaintiff in a vacant and available cell; in failing to conduct an hourly cell inspection as required by the jail rules; and in failing and neglecting to remove plaintiff from the cell immediately after his injury for medical attention; all of which negligence he asserts is imputed to the City of Omaha.

This cause of action is grounded on negligence. This court has abrogated the doctrine of governmental im-

munity as a defense to certain kinds of negligence actions which we have heretofore discussed. The issue here is whether or not the negligence alleged is one to which the defense of governmental immunity should be abrogated. The proximate cause of the injury sustained by the plaintiff is the criminal assault by the three drunken and belligerent inmates of the jail cell in which plaintiff was confined. It is alleged that the assault and resulting injuries were caused by the failure of the police guards to confine plaintiff in an available, vacant cell; in failing to remove plaintiff to such a cell when he expressed fear of the other inmates; in failing to properly supervise the jail by required inspections; and in failing to promptly remove plaintiff after the assault for the purpose of affording medical attention.

It is not necessary to decide whether or not the governmental immunity doctrine is to be abrogated on the type of negligence involved in plaintiff's third cause of action. The general demurrer was properly sustained on other grounds. It alleges conclusions and not facts which is fatal when attacked by general demurrer.

The proximate cause of plaintiff's injury was the unlawful assault upon him by the three inmates of the cell where he was confined. The assault was committed by third persons, not by the police or jailers. Plaintiff asserts in his petition that the jailers were negligent in failing to confine him in an available, vacant cell. To maintain his cause of action on such ground, plaintiff must plead facts showing negligence by the defendant. It is not negligence, without more, to refuse private accommodations in a jail to each person taken into custody. There must be facts pleaded which show that defendant knew or should have known the risks and dangers which not guarded against amounted to negligence. There was no such pleading here.

Plaintiff alleges that it was negligence on the part of defendant not to remove plaintiff to a vacant cell when he expressed fear of the other inmates. Here again the

plaintiff must plead facts and not a mere conclusion that he was fearful of the other inmates. It is necessary that facts be pleaded which defendant knew or should have known required that plaintiff be removed from the cell to escape a charge of negligence by defendant. It is alleged that defendant was negligent in not making cell inspections in accordance with jail rules. A breach of jail rules affords no basis of an action for negligence unless there are pleaded facts which, if sustained by evidence, constitute a cause of the injury. There are no such facts pleaded here. Plaintiff asserts the defendant was negligent in not removing the plaintiff immediately from the cell for medical treatment. There are no allegations here that such delay, if established, in any manner affected the extent of the injury. The pleaded facts must show a causal relationship to the injury or its extent to constitute actionable negligence. We conclude that the third cause of action as pleaded is demurrable generally even if we assume that negligence, if such there be, was imputable to the City of Omaha.

The plaintiff contends that the trial court erred in granting a summary judgment for the defendant Andersen and against the plaintiff. The undisputed evidence is that Andersen was not present when the incidents occurred affording the basis for plaintiff's action. In fact, the evidence shows that Andersen was not only not present, but he had no knowledge of such incidents until the receipt of reports the next morning, nor is there any evidence that he gave any orders relating to the incidents or in any manner ratified the actions of the policemen or jailers with relation thereto.

In Fidelity & Casualty Co. of New York v. Brightman, 53 F. 2d 161 (8th Cir.), the court stated: "It is well-settled law that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them, unless the superior officer has directed

or encouraged or ratified such acts, or has personally co-operated therein. (Citing cases.)"

A noted text writer states the rule as follows: "* * * whether or not the subordinate is appointed by him, the public officer is not liable for the subordinate's acts unless he directs the performance of the act complained of or personally cooperates in it. The doctrine of respondeat superior has no application as between a public officer and his subordinates, who are likewise in the public service, unless the officer does direct or countenance the tortious act to be done or cooperates therein. This rule also applies to the tortious acts of policemen and other peace officers, and of municipal employees generally." 4 McQuillin, Municipal Corporations, § 12.226, p. 199.

"A public officer or agent is not responsible for the misfeasances or positive wrongs or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." Giroux v. Murphy, 88 R. I. 280, 147 A. 2d 465. See, also, Brown v. City of Shreveport (La. App.), 129 So. 2d 540; Martinez v. Cahill, 215 Cal. App. 2d 823, 30 Cal. Rptr. 566; Sarafini v. City and County of San Francisco, 143 Cal. App. 2d 570, 300 P. 2d 44; Jordan v. Kelly, 223 F. Supp. 731. In the last case cited, it is said: "The allegation that the arresting officer was acting under the general supervision, direction and control of the chief of police is not sufficient to render him liable under the statutes and the cases cited."

Plaintiff contends that Andersen is liable under the provisions of section 14-605, R. R. S. 1943, which provides: "The chief of police shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities as sheriffs in similar cases." It is not disputed that a sheriff is responsible for the acts of his deputies. It has been held in other jurisdictions, although it appears to be a case of first impression in this

state, that statutes similar to section 14-605, R. R. S. 1943, were passed for the specific purpose of giving to chiefs of police the same powers and responsibilities to enforce the law as that given to sheriffs and for this limited purpose only.

In discussing this question under a similar provision, the Washington court stated: "Manifestly, the provision which we have quoted was not for the purpose of making the chief of police liable for the acts of policemen. It does nothing more than liken his general duties and obligations to those of the sheriff of King county. If it had been the intention to hold him liable for the acts of policemen, such idea would doubtless have been exactly stated, as has been done in our statutes with reference to sheriffs." Pavish v. Meyers, 129 Wash. 605, 225 P. 633, 34 A. L. R. 561. The holding in Bower v. Davis, 13 Cal. App. 2d 678, 57 P. 2d 574, on the identical issue is to the same effect. The argument that the issue is controlled by section 14-605, R. R. S. 1943, cannot be sustained.

We find no error in the record and the judgment of the district court is affirmed.

AFFIRMED.

SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ.

We concur in the opinion of Carter, J., except that part which holds that the petition failed to state a cause of action in negligence against the defendant City of Omaha.

We are of the opinion that the allegations contained in the third cause of action of the amended petition were sufficient as against a general demurrer and that the demurrer should have been overruled as to that cause of action. We are also of the opinion that, under the circumstances in this case, the question of the applicability of the doctrine of governmental immunity should not be decided upon demurrer, and that the judgment of the district court should be reversed as to the third cause of action against the defendant City of Omaha

and the cause remanded for further proceedings.

PER CURIAM.

Three judges are of the opinion that the judgment of the district court should be affirmed. Four judges are of the opinion that the judgment of the district court should be affirmed except as to the third cause of action against the defendant City of Omaha.

The judgment of the district court is affirmed except as to the third cause of action against the defendant City of Omaha, and as to that cause of action against that defendant the judgment is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DAVID M. GORGES, BY AND THROUGH HIS FATHER AND NEXT FRIEND, FRED M. GORGES, APPELLANT, V. DOBSON BROTHERS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.

187 N. W. 2d 91

Filed May 21, 1971. No. 37738.

1. **Highways: Negligence.** The duty of a contractor engaged in construction work on a public highway is generally to warn the public that the highway is dangerous to travel.
2. **Highways: Negligence: Contracts.** There is ordinarily no duty upon a contractor engaged in construction work upon a public highway to erect a structure that will prevent a forcible entry into the area of construction.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

J. L. Krause and William L. Howland, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Fredrick H. Kauffman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This action was brought by Fred M. Gorges, as the father and next friend of David M. Gorges, to recover damages for injuries to David caused by a lawnmower accident that occurred on May 25, 1964. A companion case, No. 37739, is an action by Fred M. Gorges for the medical and hospital expenses incurred and the loss of David's services.

The trial court dismissed the action at the close of the plaintiff's evidence. The plaintiff appeals.

The petition contained two causes of action. The first cause of action alleged that the accident was caused by the negligence of the defendant Dobson Brothers Construction Company.

The record shows that the defendant was constructing a water main along L Street to the south of the Gorges property in Lincoln, Nebraska. As a part of the project the defendant had excavated a trench approximately 3 feet wide and parallel to L Street. The centerline of the trench was 3 feet north of the curb line of L Street and 14 feet south of the property line of the Gorges property. Sod had been removed from an area approximately 18 inches wide along the north edge of the trench.

On May 25, 1964, the pipe had been installed and most of the trench had been backfilled. A part of the trench lying west of the Gorges driveway had been left open because testing, cleaning, and sterilization procedures had not been completed.

The accident happened at about 4:45 p.m. The weather was cloudy but dry. Michael Gorges, one of David's older brothers, had been mowing the lawn west of the driveway and north of the trench. He was using a riding-type power mower equipped with a steering mechanism, a throttle, a forward or reverse lever, and a clutch. The mower cut a swath approximately 18 inches wide. Michael made two rounds with the mower and then stopped near the house to get a drink of water.

David, with his mother's permission, then commenced to mow.

David was within 2 weeks of being 11 years old. He had been instructed by his father in the use of the power mower but had not had much experience in the operation of the mower.

David operated the mower to the south, parallel to the driveway, and then turned west and traveled parallel to the trench. Near the west end of the trench he started to turn to the north when he came upon a wooden stake lying in the grass. He stopped the mower, placed it in reverse, backed to the east and then to the south. One rear wheel of the mower dropped into the trench and then both David and the mower fell into the trench. While trying to protect himself from the mower, which was still running, his right hand struck the blade. The injury resulted in the loss of most of his right hand.

The trench had been open for about 2 weeks. There was a barricade at the west end of the trench, a barricade at the east end of the trench, and a barricade in the street south of the trench. There was no barricade or other protective or warning device on the north side of the trench. David testified that he was "aware the ditch was there" when he was operating the mower parallel with the trench.

The plaintiff alleged that the defendant was negligent in failing to maintain barricades, signs, fences, railings, and watchmen at the excavation; in failing to maintain a covering over the excavation; and in leaving the excavation open longer than was reasonably necessary.

There was no evidence of negligence on the part of the defendant in leaving the excavation open longer than was reasonably necessary. The evidence showed that the testing and sterilization procedures performed by the city were not completed until May 28, 1964, and that the excavation had been left open to facilitate these procedures.

So far as signs and barricades were concerned, the

evidence shows that there were barricades on three sides of the excavation. The accident happened in daylight, the excavation was open and obvious, and David knew about the excavation and was aware of it while he was operating the mower nearby.

Although located north of the curb line of L Street, the excavation was actually situated in L Street. The duty of a contractor engaged in construction work on a public highway is generally to *warn* the public that the highway is dangerous to travel. Carson v. Dobson Bros. Constr. Co., 181 Neb. 287, 147 N. W. 2d 797. Although a barricade should be an obstruction or impediment to travel, there is ordinarily no duty upon the contractor to erect a structure that will prevent a forcible entry into the area of construction. There was no duty upon the defendant to erect such a structure along the north side of the excavation in this case.

Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040, cited by the plaintiff, involved an accident at night in an excavation, not in a street or highway, and not properly protected by lights, barricades, or other warning.

We think the evidence in this case failed to establish any negligence on the part of the defendant that would permit a recovery by the plaintiff and justify submitting the case to the jury.

The second cause of action alleged that the defendant had breached its contract with the city which required the defendant to take reasonable precautions to protect the public from injury. The specifications alleged by the plaintiff in this cause of action were substantially the same as those alleged in the first cause of action. However, there was nothing alleged or proved in regard to the second cause of action which established any greater duty upon the defendant than that imposed by the general law. Thus, there was a failure to create a jury question on this cause of action.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

FRED M. GORGES, AN INDIVIDUAL, APPELLANT, V. DOBSON BROTHERS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.

187 N. W. 2d 94

Filed May 21, 1971. No. 37739.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

J. L. Krause and William L. Howland, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Fredrick H. Kauffman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action by Fred M. Gorges to recover the medical and hospital expenses incurred by David M. Gorges and the damages resulting from the loss of his services as a result of an accident on May 25, 1964. It is a companion case to No. 37738, Gorges v. Dobson Bros. Constr. Co., *ante* p. 19, 187 N. W. 2d 91, decided today.

The petition filed in this case contained the same allegations, essentially, as the petition filed in No. 37738, and the cases were consolidated for trial by stipulation. The action was dismissed at the close of the plaintiff's evidence.

The result in this case is controlled by the decision in No. 37738. The judgment of the district court is affirmed.

AFFIRMED.

JACK JOHNSON, A MINOR, BY AND THROUGH G. L. JOHNSON, HIS FATHER AND NEXT FRIEND, APPELLANT, V. MUNICIPAL UNIVERSITY OF OMAHA, APPELLEE.
187 N. W. 2d 102

Filed May 21, 1971. No. 37774.

Negligence: Torts. Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

Thomas A. Walsh of Boland, Mullin & Walsh, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

While plaintiff was competing in a pole vault event held by defendant, he fell upon foam rubber on a wooden box to his injury. In this negligence action his petition was dismissed on demurrer. He appealed. We reversed the judgment and remanded the cause, deciding that defendant was subject to suit and liability for negligence. See Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N. W. 2d 286 (1969). On remand and at the close of all evidence at the trial, the district court dismissed plaintiff's petition. Plaintiff appeals. He asserts the evidence was sufficient to carry the case to the jury.

In May 1967 plaintiff represented Fort Hays College in the pole vault event of a conference track meet in defendant's stadium. With a fiber glass pole furnished by Fort Hays he practiced one vault without enough carry which speed generates. He fell back. The cross-

bar was elevated at 12½ feet for his next vault which would be his first competitive one of the meet. Having run off the ground, he thought the flection of the pole good but the carry insufficient. Falling, he struck the crossbar and a burlap bag whose dimensions were 4 by 6 feet and which contained foam rubber. The bag covered the part of the wooden box nearest the upright and the landing area. The injury happened when he crashed on the bag and the part of the box.

The surface of the box, 2 by 3 feet, lay 17¾ inches above ground, and sacks of foam rubber covered parts of it. The box was one of two supporting the uprights which had base diameters of 17 inches. The uprights stood 12 feet apart at or near the edge of the landing area. The latter was covered with a canvas over a net filled with a piece of foam rubber 4 by 14 by 16 feet. The burlap bag on each box, of course, provided much less protection.

Defendant had built the wooden box and a twin especially to support the uprights. Its officials had seen similar boxes so used elsewhere. The practice, however, was not widespread. At most colleges the uprights then rested on dirt, grass, or concrete. Even so, protective materials were piled around the bases.

The boxes expedited the event and they also eased the work of the officials. A competitor received a preference regarding the horizontal distance from the slideway in which he would rest his pole, forward to a point directly underneath the crossbar. Officials attempted to move the uprights without dislodging the crossbar. They experienced difficulty in stooping and moving the uprights across rough or uneven surfaces. Defendant earlier had laid a slab of concrete for the pole vault event. The slab proved unsatisfactory - too rough and uneven.

The boxes also may have served another purpose. Without them the uprights could accommodate a cross-

bar no higher than 15 feet. The conference record was 14 feet 5¾ inches.

Usefulness of the boxes in light of safety factors at the time was affirmed by three representatives of defendant as follows: Director of athletics, former director and coach, and chairman of the men's physical education department and an official at the event where plaintiff had sustained the injury. It also was affirmed by the track coach of South High School in Omaha.

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done. Restatement, Torts 2d, § 291, p. 54.

The evidence failed to raise an issue of negligence for the jury. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTIS JOHNSON, APPELLANT.
187 N. W. 2d 99

Filed May 21, 1971. No. 37800.

1. **Criminal Law: Guilty Plea.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must disclose the defendant entered his plea understandingly and voluntarily.
2. **Criminal Law: Guilty Plea: Motions, Rules, and Orders: Evidence.** A motion to withdraw a plea of guilty should be sustained only if the defendant proves that withdrawal is necessary to correct a manifest injustice and defendant must establish such ground by clear and convincing evidence.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Owen A. Giles, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Artis Johnson, appeals from a conviction based on his plea to an amended information charging him with the crime of manslaughter. He alleges that the court below erred in accepting his plea in the absence of any showing that it was freely, voluntarily, and intelligently entered; in failing to make inquiry of him as to the factual basis of his plea; and in overruling his pro se motion to withdraw his plea. We affirm.

Defendant was originally charged with the crime of second degree murder. The case proceeded to trial on that offense. After counsel had passed the jurors for cause the defendant through counsel, pursuant to plea discussions with the prosecution, advised the court that he wished to plead guilty to a charge of manslaughter in accordance with a plea bargain. The prosecution dismissed the charge for second degree murder and filed an amended information charging the defendant with manslaughter. After the defendant entered a plea of guilty to the amended charge of manslaughter, the jury impaneled on the charge of second degree murder was dismissed.

When the defendant was arraigned on the amended complaint he said, "Well, I really want to try it now." He had a conference with his lawyer and the court explained the penalty for second degree murder and the penalty for manslaughter, which was 1 to 10 years. After considerable hedging in an attempt to learn the exact sentence and whether he could still be tried on the original complaint, the following colloquy took place: "THE COURT: Mr. Johnson, we don't want any pleading guilty to anything that we are not guilty of. We have a jury right down the hall and we had them in

the Court Room on the other charge and we were in the course of beginning the trial. If you are not guilty of this charge, I am not going to accept a plea of guilty. I don't want any wishy-washy pleas here. Either you are entering a plea of guilty to manslaughter, waiving your right to a trial by jury, waiving the obligation upon the State to call witnesses against you and prove your guilt beyond a reasonable doubt, so if you have any hesitancy whatsoever as to whether or not you are guilty of this charge, we will enter a plea of not guilty and I imagine the County Attorney's Office will reinstate the charge of second degree murder and we will proceed with the charge of second degree murder. THE DEFENDANT: I will enter this plea of guilty."

The court then explained the nature of the charge to the defendant, and the following occurred: "THE COURT: All right, sir, how do you plead to the charge of manslaughter, guilty or not guilty? THE DEFENDANT: Not guilty. THE COURT: Not guilty? THE DEFENDANT: Yes, sir. MR. FOREHEAD: May I, Your Honor? If you plead not guilty to a manslaughter charge, there is no reason why Mr. Brown won't reinstate the second degree murder charge against you and proceed to try it on that basis. So, if you plead not guilty, we are going to go—we are going to be in the same position before we started to impanel the jury. There will be a second degree charge against you which covers the penalty up to life imprisonment. Now, you are now being asked whether you want to plead guilty to manslaughter, which carries a penalty of from one to ten years. THE DEFENDANT: This is what I was asking when I said not guilty—you said that the charge would go back up, you know, and I don't want that. THE COURT: You misunderstood my question. What I am asking you to do is to plead guilty or not guilty to the charge of manslaughter. THE DEFENDANT: I plead guilty to the charge of manslaughter." Previous to accepting the plea, the court was assured by the prosecution that there was

sufficient evidence to prove the guilt of the defendant beyond a reasonable doubt.

This case is not too different from North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160 (1970), 27 L. Ed. 2d 162, where a plea bargain was upheld and the plea of guilty was ruled valid notwithstanding the defendant's refusal to factually admit the offense charged. As we said in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, a plea of guilty must not only be intelligent and voluntary to be valid but the record must disclose the defendant entered his plea understandingly and voluntarily. We have no hesitancy in finding that defendant's guilty plea was freely, voluntarily, and intelligently entered. He fully understood that by pleading guilty to manslaughter he was avoiding a trial for second degree murder for which a jury had been impaneled to try him. By virtue of the plea bargain agreement, the original charge was reduced to manslaughter and the jury dismissed. Defendant is obviously attempting to abuse the plea bargaining process. To permit it would seriously weaken and tend to undermine and possibly destroy a beneficial procedure which has been specifically approved by the United States Supreme Court. See, Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747; North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160 (1970), 27 L. Ed. 2d 162.

It is evident from the record that defendant, who had a previous felony conviction, was anxious to avoid trial on the second degree murder charge, and after the plea bargain was accepted if he could be sure that the State could not reinstate the original charge, wanted to go back on it and to stand trial on the lesser complaint. The court cannot permit such subterfuge.

After accepting the plea and finding the defendant guilty as charged, the court continued the matter for a presentence report. Defendant infers that at the time sentence was pronounced he made an effort to withdraw his guilty plea. The following is the record re-

ferred to by defendant: "THE DEFENDANT: I didn't know I was making a deal to plead. THE COURT: We didn't make any deal at all. I explained to you very carefully what the charge was. What do you mean 'a deal,' a deal to plead? THE DEFENDANT: I wanted the charge broke down, but I didn't know where I wouldn't go to trial. THE COURT: I spent a half hour with you that day going over every aspect of the thing with you, Mr. Johnson. I told you at that time we weren't going to play games on this, the jury was here, you consulted with your counsel, and I went over every detail of this matter with you. Is there anything you want to say in your behalf before sentence is pronounced?" We do not construe this as a motion to withdraw the plea. In any event, however, in a situation such as this, a motion to withdraw a plea of guilty should be sustained only if the defendant proves that withdrawal is necessary to correct a manifest injustice and defendant must establish such grounds by clear and convincing evidence. Defendant has not met this burden.

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF HOWARD MCLEAN COMPANY. HOWARD MCLEAN COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, NOW KNOWN AS BURLINGTON NORTHERN, INC., ET AL., APPELLANTS.
187 N. W. 2d 300

Filed May 21, 1971. No. 37827.

1. **Carriers: Evidence.** The lowest rates published or charged, for substantially the same kind of service, are prima facie evidence of a reasonable rate for the services under investigation.
2. **Carriers: Public Service Commissions.** The Nebraska State Railway Commission is empowered to fix joint-line freight rates.
3. ———: ———. In the fixing of rates, the railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to

any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. ———: ———. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where the circumstances are substantially similar.

5. **Carriers: Public Service Commissions: Appeal and Error.** On appeal from an order of the Nebraska State Railway Commission fixing rates for common carriers, the only questions for determination are whether or not the commission acted within the scope of its authority and whether or not the order entered is reasonable and not arbitrarily made.

Appeal from the Nebraska State Railway Commission. Affirmed.

Mason, Knudsen, Berkheimer & Endacott, for appellant Chicago, Burlington & Quincy Railroad.

Nelson, Harding, Marchetti, Leonard & Tate and J. Max Harding, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Applicant charges protestants with the maintenance of discriminatory railroad freight rates pertaining to the shipment of potatoes from the Scottsbluff-Mitchell area to Omaha. The Nebraska State Railway Commission found in favor of applicant and ordered a reduction in rates. We affirm the order of the Nebraska State Railway Commission.

Applicant is a dealer in potatoes with large storage facilities in Scottsbluff and Mitchell, Nebraska. Ninety percent of his potatoes are shipped to Omaha, Nebraska, and about 80 percent of this movement is by truck due to a lack of proper railway cars and cheaper truck rates. This area is served by protestant Burlington Northern Railroad, as is also the Chadron, Hemingford, and Alliance, Nebraska, area. Protestant Union Pacific Railroad Company has a line serving Gering, Nebraska, and cars may be switched at Northport from one line to the other.

Single line mileages on the Burlington Northern and joint line on the Union Pacific to Omaha are as follows:

	Single	*Joint*
Hemingford	435.6	432
Alliance	416.5	413
Scottsbluff	481.8	442
Mitchell	491.2	452
Chadron	441.9	442

Present rates per hundred are 35 cents from Hemingford and 43 cents from Scottsbluff. Increases to 37 cents and 46 cents respectively are contemplated. The record indicates that considering differences in distance, rates on potatoes shipped from Idaho to Omaha are proportionately less. Rates were lowered several years ago in the Hemingford area to meet truck competition and, thereafter, competition from the Chicago and Northwestern Railroad. It is undisputed that the truck competition is greater in the Scottsbluff-Mitchell area. It is also undisputed that by the short or joint-line route, additional switching expense of about 3 cents per hundred pounds would be encountered.

It is apparent that protestants' excuse that lower rates in the Hemingford area were justified originally by truck competition is not a valid one as the same competition is greater in the Scottsbluff area. It is also apparent that on a mileage basis, present rates discriminate in favor of the Hemingford area. The Burlington Northern has a choice of handling shipments from the Scottsbluff area direct over the longer route on its own line or making use of short or joint-line facilities with the additional switching expense. A differential in rates between Hemingford and Scottsbluff in excess of 3 cents per hundred pounds would not appear to be warranted. The order of the commission does not allow for any differential whatever but institutes similar rates, i.e. 35 cents, for both areas.

It appears that the existing 8 or 9 cent differential is unjustified and discriminatory. Protestants insist that

the 35 cent rate from Scottsbluff is noncompensatory. The evidence appears to bear this out, but it has not been shown that the same rate installed at Hemingford is compensatory. The circumstances appear to be substantially similar. The lowest rates published or charged, for substantially the same kind of service, are prima facie evidence of a reasonable rate for the services under investigation. See § 75-123, R. R. S. 1943.

Protestants contend that the Nebraska State Railway Commission is without power to fix joint-line rates. Such is not necessarily a result of the order entered but the question may well be considered. Article IV, section 20, Constitution of Nebraska, provides: "* * * The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." There being no specific legislation to the contrary, this provision is sufficiently broad to authorize the fixing of joint-line rates. In addition, section 75-118, R. R. S. 1943, provides that the commission shall have power to: "(1) Fix all necessary rates, charges and regulations governing and regulating the transportation, storage, or handling of freight and passengers by any common carrier in Nebraska intrastate commerce; * * *." In view of the foregoing, we are inclined to believe that the commission is empowered to fix joint-line rates.

Discrimination in freight rates is forbidden by section 75-126, R. S. Supp., 1969. "In the fixing of rates, the railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

"Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where

the circumstances are substantially similar." United Mineral Products Co. v. Nebraska Railroads, 175 Neb. 285, 121 N. W. 2d 492.

There is substantial evidence in the record to sustain the commission's finding of discrimination. This being the fundamental issue presented, we are unable to hold that the order entered is arbitrary or unreasonable. On appeal from an order of the Nebraska State Railway Commission fixing rates for common carriers, the only questions for determination are whether or not the commission acted within the scope of its authority and whether or not the order entered is reasonable and not arbitrarily made. See, Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331; United Mineral Products Co. v. Nebraska Railroads, *supra*.

The order of the Nebraska State Railway Commission is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE GOHAM, APPELLANT.

187 N. W. 2d 305

Filed May 28, 1971. No. 37744.

1. **Criminal Law: Venue: Appeal and Error.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
2. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
3. **Criminal Law: Kidnapping: Sentences.** The purpose of kidnapping in every instance is to make it possible to commit

some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration.

4. **New Trial: Witnesses: Evidence.** It is the rule that a new trial will not be granted on the grounds of newly discovered evidence when the only effect of the evidence is to impeach or discredit the witness.
5. **Criminal Law: Attorneys at Law.** A charge of inadequate representation can prevail only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court.
6. **Criminal Law: Indians: Jurisdiction.** The Secretary of the Interior having failed to accept the offer of retrocession embraced in Legislative Resolution 37, Eightieth Session of the Nebraska Legislature, 1969, before it was withdrawn by Legislative Resolution 16, Eighty-second Session of the Nebraska Legislature, 1971, 18 U.S.C.A., section 1162, is still applicable in Nebraska.

Appeal from the district court for Thurston County: JOSEPH E. MARSH, Judge. Affirmed as modified.

William G. Line of Kerrigan, Line & Martin and Costello, Porter, Hill, Banks & Nelson, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant Wayne Goham was convicted on an information charging kidnapping and rape, and sentenced to life imprisonment on the former and to a term of not less than 3 nor more than 20 years on the latter. We affirm the convictions but modify the sentence as set out hereafter.

An automobile in which the complaining witness and her companion were riding slid off the road when they

tried to negotiate a slippery, rain-soaked county road in Thurston County. Another car, containing seven Indian occupants, came by and the occupants, for two dollars, helped them to get their car moving. The car was backed down the hill, but after a short descent its progress was stopped by the other car which had passed it and blocked the road. The occupants of that car then approached, opened the door on the driver's side, and pulled the companion of the complaining witness from the car, striking him two or three times. He fled to seek help at an adjoining farm house. Two of the occupants of the other car then forcibly pulled the complaining witness out of her car, dragged her to their own, and drove approximately 2 miles to Big Elk Park, which lies along the Missouri River on the eastern border of and in Thurston County, where she was taken out of that car and raped by each of the seven occupants.

William Cayou, who was one of the seven, testified for the State, identified the defendant as the driver and owner of the car, and as the second of the group to be with the complaining witness in the park. The defendant is a member of the Omaha Indian Tribe. The crimes were committed within the limits of the Omaha Indian Reservation, which is situated within Thurston County. The incident occurred on July 26, 1969. Defendant was tried and convicted in March 1970. On October 24, 1970, while an appeal from the conviction was pending in this court, the Secretary of the Interior published a notice in the Federal Register purporting to accept retrocession of jurisdiction over the Omaha Indian Reservation in Thurston County, Nebraska, purportedly pursuant to an offer of retrocession previously made by the Nebraska Legislature in accordance with 25 U.S.C.A., section 1323.

Defendant sets out seven assignments of error. The first is the denial of defendant's motion for a change

of venue. He contends that "An avalanche of anti-Indian publicity" in Thurston County where the crime took place made it impossible to select a fair jury. The record does not support his contention. Defendant concedes his motion for a change of venue was technically defective in that it sought a change of venue to the district court for Douglas county rather than to an adjoining county, and that it was not supported by affidavits. The voir dire examination of the jurors, which is a part of the record, indicates that 79 prospective jurors were called. While a substantial number of them had heard about the case through the various news media, which is not unusual in a case of this nature, the record does not reflect prejudice existing at the time of the trial, which was 8 months later, to sustain defendant's contention. Defendant was able to secure an impartial jury and passed it for cause. Further, no specific complaint of any nature is made herein as to any bias or improper conduct on the part of the jury or any individual juror.

In State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775, we said: "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed."

In Dosek v. United States, 405 F. 2d 405, the Court of Appeals for the Eighth Circuit said: "The disposition by a judge of a change of venue motion rests largely in the discretion of the trial court who is the one most familiar with the local situation, and a trial court ruling upon such a motion will be upset only for a clear abuse of discretion." In that case the Court of Appeals emphasized that defendant had not charged or proved that any juror challenged for cause on valid grounds was not excused.

Defendant's second and third assignments of error involve the penalty inflicted on the kidnapping charge.

After the crime was committed but before trial, the Nebraska Legislature amended section 28-417, R. R. S. 1943, to provide that the penalty should be death or imprisonment for not less than 3 nor more than 50 years at the discretion of the jury. The penalty in effect when the crime was committed provided the death penalty or life imprisonment at the discretion of the jury. The penalty inflicted was in accordance with the statute as it existed at the time the offense was committed. In view of our subsequent holding in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, the State concedes that the amendment to section 28-417, R. R. S. 1943, which became effective September 19, 1969, should govern the penalty in this case.

In State v. Randolph, *supra,* we said: "There was no specific provision in the amending statute indicating legislative intent as to its prospective or retroactive operation. Section 49-301, R. R. S. 1943, provides that repeal of a statute shall not in any manner affect pending actions nor causes of action accrued prior to any such repeal except as may be provided in the repealing statute. This 'saving clause' on repeal applies to both civil and criminal statutes.

"While there is still some divergence of opinion among the states, we believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

"The basic issue is, of course, the intention of the Legislature. As the Supreme Court of California said in In re Estrada, 63 Cal. 2d 740, 48 Cal. Rptr. 172, 408 P. 2d 948 (1965): 'It is an inevitable inference that the Legislature must have intended that the new stat-

ute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.' "

State v. Randolph, *supra,* which involved the kidnapping statute, section 28-417, R. R. S. 1943, was not released until January 22, 1971. This was several months after defendant's trial in March 1970.

Section 29-2308, R. R. S. 1943, provides: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

We said in Cryderman v. State, 101 Neb. 85, 161 N. W. 1045, that this statute should be liberally construed in favor of justice. In State v. Hall, 176 Neb. 295, 125 N. W. 2d 918, we construed it to grant authority to permit the reduction of a jury-imposed death penalty to life imprisonment when the circumstances indicated

to us that life imprisonment was an adequate punishment for the offense.

We have no doubt of defendant's guilt herein. The misdirection of the jury as to possible penalties could not be considered a miscarriage of justice because it results from a subsequent construction of the statute involved. A verdict of life imprisonment was a permissible penalty for kidnapping when the offense was committed. This is no longer a penalty under our subsequent holding in State v. Randolph, *supra*. The maximum penalty under the amended statute which became effective September 19, 1969, 6 months before the actual trial herein, is death or imprisonment for not less than 3 nor more than 50 years. We hold the amendatory act may be applied constitutionally to the act herein although committed prior to its passage, because the sentence had not become final because of this appeal.

Pursuant to section 29-2308, R. R. S. 1943, considering all the circumstances and our subsequent holding in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, we reduce the penalty on Count I, the kidnapping conviction, from life imprisonment to a term of 35 years.

Defendant's fourth assignment of error is directed to the submission of the kidnapping charge. He relies on People v. Daniels, 71 Cal. 2d 1119, 80 Cal. Rptr. 897, 459 P. 2d 225, and People v. Levy, 15 N. Y. 2d 159, 204 N. E. 2d 842, and argues that the modern trend is away from the use of kidnapping charges for behavior that amounts in substance to robbery or rape. We see no reason to change the controlling rule in this jurisdiction. The victim herein was forcibly taken from the automobile in which she was a passenger and transported at least 2 miles to Big Elk Park where she was forcibly raped. The kidnapping statute, section 28-417, R. R. S. 1943, as it existed when the act was committed, so far as pertinent herein, provides: "Whoever, having for

any of the purposes aforesaid unlawfully carried off or enticed away, decoyed, secreted or imprisoned any person, shall in furtherance of any such purpose, do or threaten to do any injury to the person so carried off, decoyed, enticed away, secreted or imprisoned, such person so offending shall upon conviction suffer death or be imprisoned in the Nebraska Penal and Correctional Complex during the remainder of his natural life at the discretion of the jury." We last interpreted this issue in State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157, and State v. Salanitro, 176 Neb. 393, 126 N. W. 2d 164, which provide a conclusive answer to defendant's contentions.

Defendant, in his fifth assignment of error, argues that the evidence was insufficient to sustain a conviction of kidnapping. The following testimony of the victim on direct examination illustrates the nature of the force used to effect the kidnapping: "Then they started to pull me out of the car, and I tried to hang on to the steering wheel and force myself against the frame of the car so they couldn't pull me out, and I said just leave us alone, and there was an individual on each side of me, and they pulled me over to their car, and I was kicking and trying to fight with them but they were just too heavy or too big and I couldn't get away from them, and when we got down to their car they tried to push me in the car, and I was very stiff, and they knocked my head against the open door so I was kind of dizzy for a few minutes, and then someone sort of like hit me in the stomach so that I would bend over, and that is when they put me in the front seat of the car, and then I remember kicking someone in the stomach who was pushing me in the car, and then they got in the car and one individual had his hand over my mouth and nose so that I couldn't breathe and I was a little panicky and when he let me go I said I couldn't breathe and I

wanted the window down, so I was sitting on the lap of the person who was by the door and I had my head out of the window all the time to the park. That is where they drove to."

The complaining witness was forcibly removed from her automobile, manhandled, and forcibly taken to a park approximately 2 miles away. We do not agree that this is an insubstantial movement of the victim, as suggested by the defendant. While it may be true that the ultimate objective was the crime of rape, this is of no moment. The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration. See State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157.

Defendant's sixth assignment of error is grounded on his contention that an accomplice, William Cayou, falsely testified that no consideration had been promised him for his testimony. This issue was injected by the defendant on his motion for a new trial on the grounds of newly discovered evidence. This evidence concerned some notes written by Cayou to a Charlene Earth while both of them were confined in the county jail. In this respect, we observe that the defendant had been told by Charlene Earth of her conversation with Cayou before his trial, and while defendant may not have had possession of the notes at the time of his trial, he was in possession of the information that Cayou was claiming he had made some type of a deal and was going to testify for the State.

There is no contention and certainly no evidence that the prosecution knowingly used perjured testimony. Even if we were to read into the inferences defendant wishes to make the finding that Cayou committed perjury, which we are unable to do, we still would have no

evidence of the knowing use of perjured testimony by the prosecution. More important, however, we believe the evidence falls far short of showing that any deal was made with Cayou by the prosecution for his testimony. Giving the evidence adduced on the motion every possible inference, it does not go to the question of the truth or falsity of Cayou's testimony, but rather only to the question of Cayou's motive in testifying. It was purely a collateral issue, not having to do with the guilt or innocence of defendant. Its only purpose would be to impeach or discredit the witness.

This court has frequently said that impeaching evidence is not a proper basis for a new trial. See Rains v. State, 173 Neb. 586, 114 N. W. 2d 399, and Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874, in which we said: "It is the rule that a new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness."

Defendant's last assignment of error alleges that he was denied the effective assistance of counsel because of counsel's consumption of intoxicants. Defendant's counsel was not court appointed but was retained counsel of defendant's own choice. There is no doubt that during the course of the trial, particularly after lunch, defendant's counsel had the odor of liquor on his breath. It is also undisputed that counsel had represented defendant and his family on other occasions and they knew that he used alcoholic liquors during the day. There is nothing apparent from the record which would indicate counsel became so incapacitated that he could not adequately conduct defendant's defense. The evidence falls far short of any indication that counsel's propensity prevented a fair trial. The most it indicates is that counsel consumed liquor on occasions when he was not in court. In any event, this court is not in as good a position as the trial court to decide the issue. The trial court had the opportunity to observe counsel, and

was in a position to know whether counsel's drinking affected his ability to adequately represent the defendant. It is a fact question on which we accept the finding of the trial court. However, we are convinced that if defendant's counsel had come to court so far under the influence of alcoholic liquor that he could not effectively represent the defendant, the trial court would have immediately postponed the trial and held counsel in contempt of court.

As the Eighth Circuit Court of Appeals observed in Hanger v. United States, 428 F. 2d 746: " '* * * a charge of inadequate representation can prevail "only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court." ' " Defendant's showing falls far short of even suggesting this possibility.

Defendant injects the argument that the State of Nebraska has lost jurisdiction over the defendant by reason of retrocession. In 1953 Congress adopted 18 U. S. C. A., section 1162, which, so far as pertinent for discussion of the question raised, provides: "(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
"Alaska	All Indian country within the Territory
"California	All Indian country within the State
"Minnesota	All Indian country within the State, except the Red Lake Reservation

"Nebraska _____All Indian country within the State
"Oregon _____All Indian country within the State, except the Warm Springs Reservation
"Wisconsin _____All Indian country within the State."

In 1968 Congress provided for the voluntary retrocession of the jurisdiction granted by 18 U.S.C.A., section 1162, by passing 25 U.S.C.A., section 1323, which provides: "(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this Section.

"(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79."

On April 16, 1969, the Nebraska Legislature adopted Legislative Resolution 37, which, so far as pertinent herein, reads: "Now, Therefore, Be It Resolved By The Members Of The Nebraska Legislature In Eightieth Session Assembled:

"1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

"2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not apply to any offenses involving the operation of motor vehicles on public roads or highways.

"3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the

Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution."

By Executive Order dated November 21, 1968, the Secretary of the Interior was authorized to accept any retrocession of jurisdiction which was to be effected by publication in the Federal Register. On October 24, 1970, the Secretary caused the following notice to be published in the Federal Register: "Pursuant to the authority vested in the Secretary of Interior by Executive Order No. 11435 (33 F. R. 17339) I hereby accept, as of 12:01 A.M. EST, October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebr. as follows: (Description boundaries omitted) except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th Regular Session on the 16th day of April, 1969.

"Walter J. Hickel
"Secretary of the Interior."

It is to be noted that the Nebraska Legislative Resolution was to retrocede all jurisdiction over offenses committed by or against Indians in the Indian country located in Thurston County acquired by the State pursuant to Public Law 280 of 1953, except traffic offenses. In the discussion on Legislative Resolution 37, the statement is made that the Commissioner of Indian Affairs had approved the Resolution and had agreed to accept retrocession of all Indian territory in Thurston County, which includes both the Omaha and Winnebago Tribes. The acceptance by the Secretary of the Interior, however, is only a partial acceptance of retrocession of jurisdiction. It is specifically limited to the areas of Indian country

located within the boundaries of the Omaha Indian Reservation in Thurston County. This definitely was not an acceptance of the retrocession offered, which was all of the Indian territory in Thurston County, and in our judgment is completely unauthorized by the terms of the Resolution of the Nebraska Legislature, and so does not constitute an acceptance. The difficulties apparent in trying to exercise jurisdiction in only a part of the Indian territory in Thurston County, which includes both Winnebago and Omaha Indians, are so patent as not to need elaboration. The Nebraska Legislature recognized this problem, and manifested its unwillingness to accept the counter proposal.

On February 1, 1971, the Nebraska Legislature adopted Resolution 16, which provides: "Whereas, the Eightieth Session of the Nebraska State Legislature, 1969, adopted Legislative Resolution 37, relating to the retrocession to the United States of jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953; and

"Whereas, the United States has not accepted retrocession in accordance with the terms and provisions of said Legislative Resolution 37,

"Now, Therefore, Be It Resolved By The Members Of The Eighty-second Legislature of Nebraska, First Session:

"1. That the action of the Eightieth Session of the Nebraska State Lgislature, 1969, approving Legislative Resolution 37 is rescinded, and the offer of retrocession therein contained is withdrawn.

"2. That a duly attested copy of the resolution be transmitted by the Clerk of the Legislature to the Secretary of Interior of the United States."

In our judgment, the original resolution of retrocession could not be effective until it was accepted by the federal government. A partial acceptance is not ef-

fective unless and until it is approved by the State. The determination of the extent of retrocession was left to the states by 25 U. S. C. A., section 1323, since the United States is authorized to accept all or any measure of retrocession. The measure of jurisdiction to be retroceded was a matter for the state to determine, and is not dictated in any way by the federal act. The attempted acceptance was not in accordance with the terms of the offer, and was therefore of no force and effect. The offer of retrocession having been withdrawn, 18 U. S. C. A., section 1162, is still applicable in Nebraska.

Having reached the conclusion that retrocession never became effective, it is unnecessary to discuss the questions raised by the parties to be considered in the event we had found retrocession to be effective.

For the reasons given above, the conviction of the defendant on both Counts I and II is affirmed. The penalty on Count I is reduced from life imprisonment to a term of 35 years. The judgment entered is affirmed in all particulars except as noted above.

AFFIRMED AS MODIFIED.

McCOWN, J.

I concur in the affirmance of the convictions. I do not concur in the later disposition.

STATE OF NEBRASKA, APPELLEE, V. DENNIS TYNDALL, APPELLANT.

187 N. W. 2d 298

Filed May 28, 1971. No. 37889.

1. **Criminal Law: Sentences.** The habitual criminal act, section 29-2221, R. S. Supp., 1969, does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered.
2. **Criminal Law: Indians: Jurisdiction.** The Nebraska Legisla-

ture having withdrawn its offer of retrocession, 18 U. S. C. A., section 1162, is still applicable in Nebraska.

Appeal from the district court for Thurston County: JOSEPH E. MARSH, Judge. Affirmed as modified.

William G. Line of Kerrigan, Line & Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant Dennis Tyndall was convicted under an information charging kidnapping, rape, and with being an habitual criminal. He was sentenced to life imprisonment on the kidnapping count, to a term of 20 years for rape, and to an additional term of 10 years as an habitual criminal. The sentences are to be served consecutively. We affirm the convictions but modify the life imprisonment sentence on Count I (kidnapping), and vacate the sentence for a term of 10 years on Count III (habitual criminal charge).

Defendant, who was a member of the Omaha Indian Tribe, was one of seven Indians involved in the kidnapping and rape incident described in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305. He was tried in October 1970, 7 months after the Goham trial. Reference is made to that case for a recitation of the pertinent facts. As described therein, the complaining witness was forcibly dragged from her car, forced into a car occupied by seven Indians, and taken 2 miles to Big Elk Park where she was forcibly raped by them. The complaining witness identified the defendant as one of the individuals who forced her from her car and as the first one to rape her.

Defendant lists four assignments of error. They are: "The court erred: 1. In failing to vacate the convic-

tion for kidnapping as the alleged kidnapping was incidental to the charge of rape. 2. In imposing a sentence of life imprisonment for kidnapping as the statute in effect at the time of trial provided for a maximum sentence of 50 years for kidnapping. 3. In sentencing defendant to a separate consecutive term of ten years imprisonment for being an habitual criminal. 4. In failing to dismiss all proceedings against defendant for the reason that the court had lost jurisdiction by virtue of retrocession of criminal jurisdiction to the United States."

We adequately discussed defendant's first and second assignments of error in State v. Goham, 187 Neb. 34, 305 N. W. 2d 187. What we said there is fully applicable and controlling herein.

Defendant's third assignment of error must be sustained. The habitual criminal act, section 29-2221, R. S. Supp., 1969, does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered. Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403. We accordingly vacate the separate sentence on Count III, the habitual criminal charge.

The fourth assignment of error alleges that the courts of Nebraska have lost jurisdiction herein because of the retrocession of criminal jurisdiction to the United States. The defendant's trial was completed October 15, 1970. The Secretary of the Interior published a notice in the Federal Register purporting to accept retrocession of jurisdiction over the Omaha Indian Reservation in Thurston County, Nebraska, on October 24, 1970. Defendant's motion for a new trial was overruled and he was sentenced on October 26, 1970. The Nebraska Legislature on February 1, 1971, withdrew its offer of retrocession because the United States had not accepted it in accordance with the terms and provisions

of Legislative Resolution 37, adopted April 16, 1969. The resolutions and discussion are more particularly set out in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305. That case determined that the offer of retrocession having been withdrawn, 18 U. S. C. A., section 1162, is still applicable in Nebraska. There is no merit to defendant's fourth assignment of error.

The conviction of the defendant on the three counts herein is affirmed. The sentence on Count III is vacated and the sentence on Count I, for the reasons described in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305, is reduced from life imprisonment to a term of 35 years. In all other respects, the judgment is affirmed.

AFFIRMED AS MODIFIED.

ARMON LOY TODD, JR., A MINOR, BY ARMON L. TODD, HIS FATHER AND NEXT FRIEND, APPELLEE, V. RALPH BOALS ET AL., APPELLANTS.

187 N. W. 2d 284

Filed May 28, 1971. No. 37776.

1. **Master and Servant: Words and Phrases.** The relation of master and servant cannot be defined in general terms with substantial accuracy.
2. **Appeal and Error: Instructions: Trial.** It is prejudicial error for the district court to submit to a jury an essential issue of fact without evidentiary support.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded for a new trial.

Jewell, Otte & Pollock, for appellants.

Cecil W. Orton and Leroy W. Orton, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

While plaintiff Armon Loy Todd, Jr., was weeding a

bean field farmed by defendants, Boalses, Todd sustained physical injury accidentally caused by a fellow worker. This resultant action was tried on the theory that Boalses would not be liable if the work group had been an independent contractor. The verdict went for Todd. Boalses appeal. They assert that as a matter of law the group was an independent contractor and that errors in a jury instruction prejudiced them.

On July 17, 1965, the date of the injury, the group comprised Todd, age 15, and 5 other boys, ages 15 and 16. It had begun to form without Todd earlier in the summer. Having weeded a bean field of Leland George under his supervision, the boys moved to the farm of George Stading. He separated them so that those in front weeded with bean hooks. He stationed two with corn knives four feet behind the others to cut weeds that were too large for the bean hooks. Todd pursuant to an agreement with one boy joined the group there. He brought a corn knife furnished by his grandfather. A boy explained its use. After an hour when they completed their work at Stading's farm, the group moved to the Boals farm.

The boys had named no boss, although Vic Russell and Charles Helt "kept things going." Helt had negotiated with Robert Boals, who had desired 4 to 6 boys. Robert had agreed to pay Helt $0.90 an hour each boy worked. Upon their arrival, Robert issued bean hooks but no corn knives. He then drove to the field which lay ½ mile from the farmhouse, the workers following in Russell's automobile. Robert having pointed out the field, departed immediately. Neither Robert nor Ralph exercised any direct control over the group, although Robert warned against carelessness. The latter knew of the corn knives.

The next morning the group returned directly to the Boals field. They spaced themselves as they had done in Stading's field. All except Russell were using corn knives because weeds were thick. Todd, Helt, or both

wandered, and Todd knew they were close together. When he pushed back weed branches to straighten the stem, Helt swung his knife at the weed. The knife struck Todd's hand.

Evidence whether supervision of boys who weeded bean fields was common practice in the county conflicted sharply. Payment to one boy for all work, no withholding of income or social security taxes, and the boys fixing work times were common practice. They were also elements of the Boals transaction.

The relation of master and servant cannot be defined in general terms with substantial accuracy. Control or the right to control is often the chief distinction between the relation of master-servant and of employer-independent contractor. See, Bodwell v. Webster, 98 Neb. 664, 154 N. W. 229 (1915); Restatement, Agency 2d, § 2, p. 12, and § 220(1), comment c, p. 486. In the present case the issue was one of fact.

The district court in instructing the jury on Todd's petition copied this allegation: ". . . when the plaintiff and the other boys first went to the Boals farm they were escorted to the bean field where they were ordered to start work." The "order" in context was referable only to Robert. That part of the allegation wanted evidentiary support.

It is prejudicial error for the district court to submit to a jury an essential issue of fact without evidentiary support. See, Pensyl v. Gibb, 182 Neb. 573, 156 N. W. 2d 27 (1968); NJI No. 2.01. The business relation between Boalses and Todd's group was the crucial issue, and it was close. The instruction constituted prejudicial error.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

PAXTON & VIERLING STEEL CO., A CORPORATION, APPELLANT, V. C. R. BARMORE, DOING BUSINESS AS WESTERN PLAINS MILL EQUIPMENT CO., ET AL., APPELLEES.
187 N. W. 2d 590

Filed May 28, 1971. No. 37794.

1. **Liens: Contracts: Property.** The lien of a materialman for material furnished to a contractor does not depend upon a contract existing between the materialman and the owner. The lien is given because the material furnished was used in the construction of the building or other structure.
2. **Liens: Contracts: Property: Statutes.** Section 52-102, R. R. S. 1943, makes no requirement concerning the contract between the materialman and the contractor. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien.

Appeal from the district court for Colfax County: C. THOMAS WHITE, Judge. Affirmed as modified.

Swarr, May, Royce, Smith, Andersen & Ross, for appellant.

Yost, Schafersman, Yost & Lamme, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action to foreclose a mechanic's lien. The plaintiff, Paxton & Vierling Steel Co., is a steel supplier at Omaha, Nebraska. The plaintiff furnished steel to C. R. Barmore, doing business as Western Plains Mill Equipment Co., for the construction of a feed mill at Howells, Nebraska, for the defendants, Lambert F. Pekarek and Ludmilla H. Pekarek.

The plaintiff claims that the amount due under its lien is $3,447.49 plus interest and costs. The trial court found that the plaintiff should have judgment for $162.04 plus interest and costs. The plaintiff appeals.

The record shows that the plaintiff made a written proposal, which was accepted by Barmore, to furnish structural steel for the mill in the amount of $2,360.

The structural steel was to be fabricated in the plaintiff's shop so that it could be erected on the site by merely fastening it together with bolts. The remainder of the steel furnished by the plaintiff was material used in construction of bins, hoppers, and other parts of the mill and was fabricated by Barmore at the site or by another subcontractor. This steel amounted to $3,447.49 and was furnished as and when requested by Barmore. There was no firm agreement as to quantity or price concerning this steel, but it was all furnished at base price plus regular freight.

The first item was furnished March 12, 1968, and the last item October 10, 1968. Most of the steel had been furnished by July 15, 1968. An order consisting of beams, angles, and bars amounting to $39.71 was furnished on September 4, 1968. An order for a length of 4-inch pipe and 24 bars to be rolled into the shape of a ring and amounting to $122.33 was furnished on October 10, 1968. These are the only items which the trial court found could be included in the lien which was filed on November 20, 1968.

The plaintiff contends that the trial court erred in finding that a subcontractor's lien could not be based upon an open account, and that the statutory time for filing a lien ran from the date of each delivery of material.

This case involves material furnished to a contractor by a materialman. There was no contract between the Pekareks and the plaintiff for the steel furnished to Barmore. Section 52-102, R. R. S. 1943, provides that a person who furnishes material to a contractor for the construction of a mill may secure a lien by filing a sworn statement of the amount due from the contractor within 3 months from the furnishing of the material. The statute further provides that the risk of payments made to the contractor until the expiration of the 3 months shall be upon the owner, and that the owner

shall not be liable to action by the contractor until the expiration of the 3 months.

The lien of a materialman for material furnished to a contractor does not depend upon a contract existing between the materialman and the owner. The lien is given because the material furnished was used in the construction of the building or other structure. Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313.

The record indicates that the controversy in the district court centered around the nature of the contract between the plaintiff and Barmore. The amended petition alleged that the plaintiff and Barmore had entered into a written contract that had been amended orally to provide for delivery of additional material as necessary. The defendants alleged that each item furnished after the written proposal was upon a new agreement between the plaintiff and Barmore.

Section 52-102, R. R. S 1943, makes no requirement concerning the contract between the materialman and the contractor. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien. Rosebud Lumber & Coal Co. v. Holms, *supra*; Peters v. Halligan, 182 Neb. 51, 152 N. W. 2d 103; Great Western Mfg. Co. v. Hunter Bros., 15 Neb. 32, 16 N. W. 759. An open account is sufficient. See Walker v. Collins Constr. Co., 121 Neb. 157, 236 N. W. 334. Occidental S. & L. Assn. v. Cannon, 184 Neb. 659, 171 N. W. 2d 166, cited by the Pekareks, involved a contract between an owner and a materialman.

The contract between Barmore and the Pekareks was for the construction of a feed mill. There is no contention that the material furnished by the plaintiff was not used in the construction of the feed mill. The material furnished on October 10, 1968, was used for manhole flanges and covers and for a roof support for the elevator leg. There is no contention that any of the material furnished was to replace defective material or that de-

livery was delayed to extend the time for filing a lien. The evidence rebutted any presumption arising from the length of time intervening between the deliveries on July 15, 1968, and those in September and October.

The Pekareks alleged that they had requested a lien waiver. On June 24, 1968, the plaintiff wrote to the Pekareks stating that Barmore owed $2,845 for material and that the plaintiff would not furnish a lien waiver until all bills were fully paid. The lien was filed on November 20, 1968. On November 23, 1968, the Pekareks took a receipt from Barmore showing payment in full to him.

The record sustains a finding that the plaintiff is entitled to a lien in the amount of $3,447.49 as alleged in its petition. The judgment of the district court is modified to increase the amount of the judgment from $162.04 to $3,447.49, and as modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

DELBERT R. GIFFORD, APPELLEE, V. AG LIME, SAND AND GRAVEL COMPANY, A CORPORATION, ET AL., APPELLANTS.
187 N. W. 2d 285

Filed May 28, 1971. No. 37819.

1. **Workmen's Compensation.** The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.
2. **Workmen's Compensation: Evidence.** The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony.
3. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.
4. ———: ———: ———. Upon appellate review of a work-

men's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record.

Appeal from the district court for Dixon County: JOSEPH E. MARSH, Judge. Affirmed.

Leamer & Galvin and Wetz & Cosgrove, for appellants.

Ryan & Scoville and P. F. Verzani, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The plaintiff recovered a workmen's compensation award in the one-judge workmen's compensation court. The defendants appealed directly to the district court. The district court on trial de novo found in favor of the plaintiff and entered judgment awarding workmen's compensation benefits.

The plaintiff, Delbert R. Gifford, was first employed by the defendant, Ag Lime, Sand and Gravel Company, in 1954. At the time of the injury here, he was employed as a mechanic and heavy equipment operator. On February 10, 1967, the plaintiff was repairing a piece of heavy equipment. He was alone in the defendant's workshop. His testimony was that he lifted a gear weighing between 90 and 100 pounds to place it in the final drive housing of the caterpillar unit. As he lifted the gear he felt a sharp pain in his back at about the belt line. He dropped the gear on the floor and sat down for about 30 minutes. The rest of the day he cleaned up and did light work, but he never completed the work of replacing the gear. When he went home after work, he lay down on the floor and did not eat anything that evening. His wife testified that he complained of his back that night and corroborated his testimony as to his conduct during the evening. He advised his employer of the injury sometime during the same week. He continued to work, but did only

light work thereafter and operated only rubber-tired equipment. The testimony of plaintiff and his wife as to all of the foregoing facts was not contradicted by any other witness.

The plaintiff did not seek medical attention during February and March of 1967, but testified that the pain in his back was getting worse and had started going down a leg. Sometime in April 1967, he went to see Dr. Carney, a chiropractor in Ponca, Nebraska. He saw him once or twice for his back. On April 20, 1967, he went to the Molstad Chiropractic Clinic in Sioux City, Iowa. He had seven or eight treatments to his back there. On May 8, 1967, he went to Dr. Faithe, an M.D. in Ponca, Nebraska. Dr. Faithe thought he had a disc problem and does not recall that he identified the back injury with any specific incident. She suggested that he see a specialist. On May 23, 1967, he went to Dr. Browne, a neurosurgeon in Omaha, Nebraska. The history given to Dr. Browne was that the onset was approximately six weeks before and had been gradual and progressive since. Dr. Browne made no inquiry as to any previous trauma and thought he possibly had a lumbar disc syndrome. He recommended that if his back did not improve in a week or two, the plaintiff should return. On June 16, 1967, plaintiff consulted Dr. Blume, a neurosurgeon in Sioux City, Iowa. The history given to Dr. Blume included the lifting incident on February 10, and also ruled out any previous back pain or injury. The history also included the consultation with Dr. Browne and his diagnosis and recommendation for treatment. Dr. Blume's initial diagnosis was a ruptured disc. Plaintiff was hospitalized for a myelogram on June 23rd, which confirmed the diagnosis. On July 2, 1967, Dr. Blume performed a partial laminectomy and the ruptured discs were removed. Dr. Blume testified that the injury to the plaintiff's lumbar spine was caused by the lifting accident of February 10, 1967. No doctor directly contradicted that opinion and both doctors who

testified on the issue were in agreement that the plaintiff had a permanent injury.

Defendant's challenge to the judgment rests on the contention that the evidence was insufficient and that the plaintiff's testimony was uncertain, inconsistent, contradictory, and differed from previous testimony. Concededly, the plaintiff's memory for detail was poor. We cannot say that his testimony was materially contradictory. Its acceptance rests on the credibility of the plaintiff as a witness. The fact that the plaintiff was alone at the time the injury occurred does not wipe out his own testimony nor the evidence of objective symptoms of injury. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony. Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547.

The vital issue here involves the nature and posture of appellate review in this court in a workmen's compensation case. Some history is appropriate. Since 1935, the workmen's compensation law of Nebraska has provided for an initial hearing before a single judge of the Nebraska Workmen's Compensation Court. An appeal from that judgment may be taken and rehearing had either to the Nebraska Workmen's Compensation Court sitting en banc or to the district court. In either case, the rehearing is de novo and a record is made. If the initial appeal from the one-judge compensation court hearing is taken to the workmen's compensation court en banc, an additional appeal may be taken from that court to the district court. That appeal is based on the record made in the workmen's compensation court and

no new evidence is taken in the district court. An appeal may be taken from the district court to this court, whichever route may have been followed previously.

In an appeal from the workmen's compensation court en banc to the district court, section 48-184, R. R. S. 1943, and its predecessor statutes have provided: "* * * that a judgment, order, or award of the Nebraska Workmen's Compensation Court shall be set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the order or award was procured by fraud, (3) the findings of fact by the court are not supported by the record, or (4) the findings of fact by the court do not support the order or award." That language has remained unchanged since 1935.

Section 48-185, R. R. S. 1943, and its predecessors since 1935, have provided for appeals from the district court to this court in workmen's compensation cases. The relevant portions of Laws 1935, c. 57, § 13, p. 195, originally provided: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law * * * a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order or award was procured by fraud. (3) That the findings of fact are not *conclusively* supported by the evidence as disclosed by the record, and if so found, the cause shall be considered de novo upon the record. (4) That the findings of fact by the court do not support the order or award." (Emphasis ours.) What is contained in both sections 48-184 and 48-185, R. R. S. 1943, was originally a part of the same section. The sections were not separated until 1943.

This court has consistently held that where the initial rehearing is had before the compensation court en banc, then the review in the district court under section 48-184, R. R. S. 1943, is in the nature of an error proceed-

ing and is limited in scope. See, Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212; Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851.

Under the provisions of section 48-185, R. S. 1943, in its original form, since few findings of fact could be said to be conclusively supported, we said: "As a practical proposition our review here is de novo upon the record." Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315 (1948). From that point on, in decisions too numerous to cite, we have stated that a workmen's compensation case in this court is considered de novo upon the record.

In 1953, section 48-185, R. S. 1943, was amended by removing the single word "conclusively." The committee statement on L.B. 85 of the 1953 Legislature was: "LB 85 provides that the word 'conclusively' shall be stricken. The committee unanimously agreed that this word shall be stricken from the Section 48-185 because it was unfair to the person appealing a case from the District Court to Supreme Court. That the amount of evidence needed in Supreme Court should not be greater than what is necessary in the District Court, as the Supreme Court decides their cases on the same record that the District Court.

"The committee also felt that it was unfair to the District Court as well as the Supreme Court in that by allowing the word conclusively to remain it changes the measure of evidence the District Court would decide the case on. The four rules set out by Section 48-184, which the District Court is guided to decide the matter and section 48-185 which the Supreme Court uses are and should be practically the same and it would be if the word conclusively was stricken as recommended by the committee."

This important change in section 48-185, R. R. S. 1943, adopted by the Legislature in 1953, has never been acknowledged or discussed by this court. It was apparently not raised. In 1960, this court once more repeated

the language that: "On an appeal from the district court to the Supreme Court in a workmen's compensation case, the case shall be considered de novo except where the findings of fact are *conclusively* supported by the evidence as disclosed by the record." Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851. (Emphasis ours.)

On the basis of that case, we continued to state that a workmen's compensation case in this court is considered de novo. Even under that method of consideration, this court developed the rule that if conflicting evidence at the final trial level is resolved by the trial court according to the demeanor and credibility of witnesses, the resulting findings will be considered correct on de novo review in this court. See, Meadows v. Skinner Manufacturing Co., 178 Neb. 856, 136 N. W. 2d 184; Cardenas v. Peterson Bean Co., 180 Neb. 605, 144 N. W. 2d 154.

We think it clear that a reasonable interpretation of section 48-185, R. R. S. 1943, as amended in 1953, is that the standards for modifying or setting aside a judgment or award, and in measuring the findings of fact by the trial court in a workmen's compensation case, are to be the same whether the review is by the district court or by this court. Appellate review in this court requires consideration and review of the record in all cases. That consideration must ordinarily take account of the determination of the trial court or jury as to the factual issues. This is particularly true in dealing with appeals which are in the nature of actions at law. De novo review implies an independent determination of the facts without restriction by any previous factual determinations made in the lower court. While the distinction may be technical, it is nevertheless a vital one. Appellate courts do not ordinarily determine factual issues de novo except when required by statute.

We therefore hold that on appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings

of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. We also hold that upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. To the extent that the holdings of Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851, and subsequent cases on these issues are in conflict, they are overruled.

The findings of fact of the trial court in this case are supported by the record whether the consideration be de novo or by the statutory standard required under section 48-185, R. R. S. 1943, as amended. The judgment is affirmed. The plaintiff's attorneys are allowed a fee of $750 for their services in this court.

AFFIRMED.

IN RE INTERESTS OF WAYNE FURROW ET AL.
STATE OF NEBRASKA IN RE INTERESTS OF WAYNE FURROW ET AL., APPELLEES, V. LOUISE RANDALL, APPELLANT.
187 N. W. 2d 586

Filed May 28, 1971. No. 37852.

1. **Infants: Statutes.** The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved.
2. ———: ———. Section 43-201 (3), R. R. S. 1943, provides that a neglected child shall mean any child who is in a situation dangerous to life or limb or injurious to the health or morals of such child.
3. **Infants: Statutes: Evidence.** Whether a child is neglected within the purview of the statute is a question of fact and each case must be determined from all of the facts and circumstances of each particular case.
4. **Infants: Parent and Child: Trial: Appeal and Error.** In cases involving child custody determinations in juvenile court and other courts, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not

be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

Conley & Greenwald, for appellant.

Paul L. Douglas and Janice L. Gradwohl, for appellee State of Nebraska.

Joseph J. Carriotto, for appellee Furrow.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The separate juvenile court of Lancaster County, Nebraska, transferred the custody of Wayne Furrow, age 9, and Jack Furrow, age 6, from their mother, Louise Randall, to their natural father, George Furrow. Louise, the mother, appeals to this court. We affirm the judgment and order of the separate juvenile court transferring the custody to the natural father, George Furrow.

The jurisdiction and action of the separate juvenile court were founded on allegations of neglect by the natural mother under section 43-201 (3), R. R. S. 1943. This statute and similar sections of our juvenile court statutes are to be liberally construed with the end objective of the best interests of the children involved. Jones v. State, 175 Neb. 711, 123 N. W. 2d 633; 42 Am. Jur. 2d, Infants, § 16, p. 21.

George and Louise were married on April 26, 1957. They separated in 1962. Termination of the marriage is obscure, Louise claiming she got a Mexican divorce in August 1965 in a town in Mexico, the name of which she does not remember. There is no evidence in this record of a divorce decree, or of a support or child custody order; nor were any sought to be introduced. Four children had been born to the Furrow marriage. The two oldest, Charles and Roger, are now dead. In 1964

they died of suffocation in an abandoned refrigerator. The refrigerator was in Louise's home. She was separated from George Furrow. The children, then ages 5 and 4 died inside the regrigerator during a period of time when she left the children alone to go across the street to make a telephone call in Dallas, Texas. The circumstances surrounding the short period of time she was separated from these children, how they got into the refrigerator, are not clear from the record. The only witness was Louise. Prior to the death of these children, Louise had threatened to kill them. She also had threatened to sell her children. There was friction between her and her mother who lived upstairs in another apartment in Kansas City. Louise testified in this case that she had stated prior to the children's death she would rather see her children dead than living with her mother and she would rather sell or give away her children than have them in her mother's custody. The evidence establishes almost conclusively that Louise had an unstable personality and that she required psychiatric help. It is undisputed that during her marriage to George Furrow she had threatened to shoot him and, in fact, she did have a .38 caliber pistol in her possession when she was at the Dallas police department after the death of Charles and Roger, described above. She had also attempted suicide.

We now trace the continuity up to the date of April 26, 1970. Louise married Robert Randall in Crocker, Missouri, on October 9, 1965, using the name Louise Silcutt. After marriage to Randall, she joined him in Europe where he was a member of the armed services. She took one boy with her, leaving the other with her mother. Randall was discharged on June 2, 1969. The family went to Kansas City, Missouri, to live. The evidence shows an unstable marital environment, with Randall leaving Louise and the children many different times. The last time he left her was about April 19, 1970, and he returned on April 26, 1970, the date of the

immediate incidents which led to this juvenile court hearing. On that date, the evidence establishes that Randall whipped both Wayne and Jack with a dog leash. Bruises and welts were left on the children and Wayne became unconscious. The occasion for the whipping was the suspicion that the boys had taken some money from the family piggy bank and given some of the money to neighbor children. Randall admitted that the injuries were the result of his "discipline." He also conceded that the punishment he inflicted was extreme. Louise's mother who resided in an apartment upstairs, heard the children screaming during the incident, went to the Randall apartment to investigate, and gave a full description of the boys' injuries. She then called the police and two officers were sent to investigate. The day after the incident Randall terminated his employment and 3 days after the incident Louise left Kansas City with Wayne and Jack at midnight without saying "good-bye" to her mother. The Randalls left Kansas City just prior to the time police officers arrived to take the children into custody. Louise testified the reason she left Kansas City was because of the incident. On arrival in Lincoln, Louise was contacted by the authorities and the present action in juvenile court ensued.

The evidence shows a definite relationship between the main incidents precipitating this action and a continuous history of marital discord, violence, and neglect of the two boys. The evidence shows there had been previous incidents of Randall striking the children severly. Also, there is evidence that Louise let the children become hungry and filthy on occasions; and that she left the children alone after school until she came home from work. The effect on the children is demonstrated in the record. Wayne was in a special school for emotionally disturbed children, and the grandmother, Mrs. Chester, mother of Louise, was paying the tuition at this school.

The statute, section 43-201 (3), R. R. S. 1943, provides that a neglected child shall mean any child "who is in a situation * * * dangerous to life or limb or injurious to the health or morals of such child." In construing this statute, we have held that it should be liberally construed to aid the purpose of its enactment and that whether a child is a neglected child within the statute is a question of fact, and each case must be determined on its own facts. Stanley v. State, 105 Neb. 260, 179 N. W. 1019; Jones v. State, *supra*. An experienced trial judge, after hearing all the evidence, determined that Wayne and Jack were neglected children in that they were in a situation which was dangerous to life and limb and injurious to the health of such children. The evidence clearly sustains this finding. We have held that in cases involving child custody determinations in juvenile court, the findings of the trial court, both as to evaluation of the evidence and to the matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544; 42 Am. Jur. 2d, Infants, § 43, p. 44.

Besides the actual abuse of the children, the most serious incident being recited in detail herein, there was general evidence of abuse of the children physically and the trial court had the advantage of the evidence showing that the marriage between the Randalls had been a stormy one, with Randall leaving the family home on many occasions. The evidence shows that Wayne was attending a special school because of his developing emotional problems and the evidence further shows that he had been overly aggressive and abusive in his play with other children. The court, in making the findings it did, also had the advantage, so important in cases of this type, of seeing and observing the witnesses, the children, and the parents involved.

Louise's appeal, ably presented by counsel, is primarily based upon an attempt to fragmentize the evidence into

isolated incidents. Then, the argument runs, that each isolated incident is not in itself sufficient to warrant the deprival of the mother to the custody, care, control, and love of her children. The charge of neglect of children is a general one and an examination of what is for the best interests of such children necessarily involves an examination of the continuous conduct and attitude of the responsible parent together with all related circumstances. Ordinarily such an examination does not lend itself to the narrow resolution of guilt or innocence of a specific charge in time and place. Child care is a continuous concept and traditional notions as to formulation of issues in an adversary proceeding must give way to an examination in a larger perspective. It appears, therefore, from an examination of all of the facts and circumstances in this case stretching over a period of time of about 6 years, that the determination of neglect by the trial court was supported by a preponderance of the evidence. The evidence further tends to show that the previous care of these children is having a very serious and substantial effect upon the present and future physical and mental health of these children. It further appears that the evidence as to physical abuse required the court to act summarily in taking the custody of the children from Louise.

The court's decree did not require the transfer of these children for placement with the state or some agency thereof. As to George Furrow, there is no evidence of a valid divorce decree or any child custody order. There is no evidence that the natural father, George Furrow, is not a fit and proper person for the custody of his minor children. The only evidence of neglect was his failure to pay child support. There was no decree requiring this and the evidence is that such support had never been sought by Louise. We also observe that the juvenile court retains a continuing supervisory jurisdiction in this case and may review the circumstances of the care of these children at any time in

the future. It appears that the decision of the trial court transferring the custody of the two boys to the natural father was proper. The trial court's order provided that a review of the matter was to be held by the judge, "upon application of any interested party showing a change in circumstances." We observe that the court did provide for a new hearing on March 26, 1971, and that at that time no motions had been filed by the parties interested requesting a change in the disposition of the custody of these children.

The judgment and order of the separate juvenile court of Lancaster County transferring the custody of the children involved herein to the natural father, George Furrow, are correct in all respects and are affirmed.

AFFIRMED.

JOE SECHOVEC, APPELLANT, V. ERNEST HARMS ET AL, APPELLEES.
187 N. W. 2d 296

Filed May 28, 1971. No. 37862.

1. **Equity: Courts: Judgments.** Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
2. **Equity: Specific Performance: Judgments: Contracts.** In a suit where specific performance is granted, all damages growing out of defendant's breach of contract are litigable in the specific performance action and separate subsequent actions to recover different elements of such damages for the same breach cannot be maintained.

Appeal from the district court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

H. E. Hurt, Jr., for appellant.

Edward Asche, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is an action at law for real estate rent. A motion for summary judgment by defendant Harms was sustained and the action dismissed. The issue on appeal is whether or not a former judgment for specific performance was res judicata as to this action. We affirm the judgment of the district court.

In September 1965, the plaintiff as purchaser and the defendants as sellers executed a contract for the sale and purchase of real estate consisting of approximately 40 acres of land in Dodge County, Nebraska. The purchase price was $325 per acre. The closing date was January 1, 1966. The contract price was tendered by the purchaser prior to January 1, 1966. On January 15, 1966, the purchaser's check was returned and the defendant sellers refused to convey. In March 1966, the plaintiff filed suit in the district court for specific performance and deposited a check for the purchase price in the district court. The petition prayed for specific performance "and for such other, further and different relief as may be just and equitable and the costs of this action." Decree for specific performance was entered on May 10, 1967. Performance was had under the decree and possession delivered to the plaintiff. Thereafter on November 6, 1967, plaintiff commenced this separate action at law to recover the reasonable rental value of the real estate for the period possession was denied.

The district court found that all damages growing out of the alleged breach of contract were litigable in the suit for specific performance and were, therefore, res judicata. Summary judgment was entered in favor of defendant Harms and the plaintiff's action dismissed.

Whether it be called an action for rental or an action for damages for delay in performance, the whole foundation for plaintiff's cause of action here rests on the

contract which was required to be specifically performed. The crucial issue is whether full satisfaction of the judgment for specific performance is res judicata in a later separate action at law to recover damages or a money judgment.

It is a basic and long-established principle of equity jurisprudence that where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73; Ready Sand & Gravel Co. v. Cornett, 184 Neb. 726, 171 N. W. 2d 775.

In an action where specific performance is decreed, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the time agreed upon. Often this has been expressed by holding that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. See Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728.

Material facts or questions which were in issue in a former action and were there admitted or judicially determined, and all points which properly belonged to the subject of litigation which might have been brought at the time with reasonable diligence, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action. See Muff v. Mahloch Farms Co., Inc., *supra*.

Cases relied upon by the plaintiff generally reflect the viewpoint that a suit for specific performance and for damages for delay in performance are two separate causes of action. That view may stem from semantic differences in approach to "damages," or "breach of

contract," as opposed to "specific performance" of contract, or it may stem from the basic differences between equity and law which are still sharply defined in some states. In Nebraska, we have adopted the rule that in a suit where specific performance is granted, all damages growing out of defendant's breach of contract are litigable in the specific performance action and separate subsequent actions to recover different elements of such damages for the same breach cannot be maintained. Waldo v. Lockard, 101 Neb. 797, 165 N. W. 154. In that case, the court stated: "All of the damages growing out of his breach of contract were litigable in the original suit in equity. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract."

Whether an action of this kind be treated as in equity or at law or a combination of both, the fundamental reasoning of Waldo v. Lockard, *supra,* remains valid.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD D. CHRISTIANSEN, APPELLANT.

187 N. W. 2d 303

Filed May 28, 1971. No. 37907.

1. **Witnesses: Trial: Evidence.** Before a witness may be permitted to testify as to testimony of a witness at a former trial, it must be shown that the witness is able to recall and relate the substance of the entire testimony upon the subject or topic involved.
2. **Trial: Evidence.** The admission of incompetent evidence is not prejudicial where the same fact is established by the testimony of the complaining party.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

A. James McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for willful reckless driving and operating a motor vehicle while his license had been revoked. The assignments of error relate to the admission in evidence of testimony concerning the county court testimony of a witness now deceased.

The record shows that the defendant and Drew Larson spent a part of the evening of February 20, 1970, drinking beer and riding around in Larson's Pontiac automobile. Later that evening they crossed the Nebraska City bridge and drove into Iowa for the purpose of drag racing.

An Iowa highway patrolman testified that on February 21, 1970, he observed the Larson automobile, which had a defective taillight, about a mile and a half east of the Nebraska City bridge. When the patrolman approached the automobile it accelerated at a high rate of speed toward the bridge. The patrolman turned on his red lights and followed the automobile, at speeds of up to 100 miles per hour, into Nebraska City.

About a quarter of a mile west of the bridge the automobile attempted to turn left but slid into some guard posts beside the road. The automobile then went up Kearney Hill about 3 or 4 blocks, turned to the right, and stopped about 75 feet from the corner. When the automobile stopped, Larson was sitting in the right front seat, the door on the driver's side was open, and a person was running to the left away from the car. The patrolman was unable to identify the person running from the automobile, but Larson identified this person as the defendant.

The principal issue in the case was the identity of the driver of the Larson automobile. The defendant denied that he drove the Larson automobile on February 21, 1970.

The trial in county court took place on March 12, 1970. Drew Larson testified at the trial, but no satisfactory record was made of his testimony. Larson died on June 20, 1970, as a result of injuries sustained in an accident. At the trial in the district court, the State was allowed to prove the former testimony of Larson by the testimony of the Iowa patrolman and a Nebraska patrolman who had been present in the courtroom during the first trial.

The Iowa patrolman and the Nebraska patrolman both testified, over objection, that Larson had testified that the defendant was driving the Larson automobile when it crossed the bridge and entered Nebraska. The defendant contends that the admission of this evidence was erroneous because there was no showing that the witnesses were able to recall and relate the substance of the entire original testimony of Larson.

In Vandewege v. Peter, 83 Neb. 140, 119 N. W. 226, this court held that if it appears that the witness cannot relate the substance of the "entire examination," the evidence is not admissible. The rule is usually stated to require the whole of the testimony on a particular point, issue, subject, or topic. See, VII Wigmore on Evidence (3d Ed.), § 2099, p. 488; 29 Am. Jur. 2d, Evidence, § 762, p. 831; 23 C. J. S., Criminal Law, § 898 b, p. 526; Annotation, 11 A. L. R. 2d 30.

Any error that may have occurred in the admission of testimony by the patrolmen that Larson had testified that the defendant was driving the automobile was not prejudicial. On cross-examination the defendant testified, without objection, that he remembered the testimony of Drew Larson in county court; that Larson had testified that the defendant was driving the automobile when they started for the bridge with the patrol-

man behind them; that the defendant was driving when they crossed the bridge; that the defendant was driving when the automobile came to a stop at the top of the hill; and that the defendant had jumped out of the left door and ran. The admission of incompetent evidence is not prejudicial where the same fact is established by the testimony of the complaining party. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

SCHOOL DISTRICT OF OMAHA, COUNTY OF DOUGLAS, STATE OF NEBRASKA, ET AL., APPELLEES, V. STATE BOARD OF EDUCATION ET AL., APPELLANTS.
187 N. W. 2d 592

Filed June 4, 1971. No. 37458.

1. **Statutes.** In construing a legislative act resort may be had to the history of its passage.
2. ———. A statute must be given a reasonable construction to accomplish the objectives and purposes of the act.
3. **Statutes: Administrative Law: Appeal and Error.** Unless the statute requires to the contrary, the findings of fact of an administrative board will ordinarily not be set aside unless they are arbitrary, capricious, or unreasonable.
4. **Statutes: Schools and School Districts: Words and Phrases.** Under the provisions of L. B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), the term per pupil cost shall mean a district's current operating expense for the preceding year, as shown in the district's annual financial report, divided by the average daily membership of resident and nonresident pupils for the preceding year, unless the context in which the term "per pupil cost" is used otherwise.
5. **Statutes: Schools and School Districts.** The purpose of L. B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), was to provide a formula for the distribution of state aid to public school districts.
6. ———: ———. The formula for determining the base amount of state aid to the different school districts in the state is

prescribed in sections 79-1333, 79-1334, 79-1336, 79-1337, and 79-1340, R. S. Supp., 1967.

7. ———: ———. The purpose of the limitations set out in section 79-1341, R. S. Supp., 1967 (section 12 of L. B. 448), is to equalize the allocation of funds as between the different school districts in the state.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On motion for rehearing, reargument granted. See 186 Neb. 170, 181 N. W. 2d 861, for original opinion. Original opinion withdrawn. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellants.

Leo Eisenstatt and J. Patrick Green of Eisenstatt, Higgins, Kinnamon & Green and William Ross King, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This case was previously reported at 186 Neb. 179, 181 N. W. 2d 861. On motion for rehearing we granted reargument. Our previous opinion affirming the judgment of the district court is withdrawn and the judgment of the district court is reversed and the cause remanded with directions.

Under sections 4, 5, 7, 8, and 11 of L. B. 448 (Laws 1967, chapter 514), providing for state aid to public school districts, the total amount of state aid for the School District of Omaha was computed for the school year 1968-69 to be $5,661,999. Under the limitation provisions of section 12 of the act, the State Board of Education limited the amount of aid to the School District of Omaha to $4,165,114. This reduction was required to bring it within the maximum 8 percent increase of the preceding year allowable under subsection (2) of section 12. The state prescribed aid, therefore, was cut in the

sum of $1,496,885. Under the provisions of section 12, the School District of Omaha filed an application for relief because of "undue hardship" as provided for in subsection (2) of section 12. On review the district court determined that section 12 (the limitation section) did not apply. The court ordered the State Board of Education to recalculate the amount of aid to Omaha and to stay further action. The State Board of Education appeals to this court. We reverse the judgment of the district court.

In order to understand this case it is necessary to review the pertinent facts and the sections of the statutes involved and to interpret them in the light of the purposes of the overall scheme and design of L. B. 448. The essential facts are not in dispute. The Legislature did not fully fund the act, and it was stipulated that the Legislature of the State of Nebraska at its 1967 legislative session for the biennium ending June 30, 1969, appropriated the sum of $25,000,000 for distribution among the school districts of the State of Nebraska pursuant to L.B. 448 (Laws 1967, chapter 514), sections 79-1330 to 79-1344, both inclusive, R. S. Supp., 1967.

Section 79-1333, R. S. Supp., 1967, provides that all state financial assistance shall be *based* upon the annual financial reports of such districts as required by section 79-451, R. R. S. 1943, and shall be paid in equal installments on the first day of December and the first day of April of the *following fiscal year.*

Section 79-451, R. R. S. 1943, provides that on or before July 20 the secretary of Class V districts shall deliver to the county superintendent a report showing the whole number of children belonging to the district between the ages of 5 and 21 years.

Also on or before November 1 two reports, one an end of the school year annual statistical summary and one an annual financial report showing number attending school under 5 and over 21 and other information including qualified teacher hours; teacher wages; amount

of money received from the county treasurer and the amount expended; the *number of mills levied for all school purposes;* the amount of bonded indebtedness; and *other facts and statistics as directed by the Commissioner of Education.* Such reports shall be submitted to the State Board of Education by Class IV and V school districts on or before the first day of November of each year. (Omaha is a Class V district.)

Under the provisions of L. B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), *"Unless the context otherwise requires* * * *

"(3) Per pupil cost shall mean a district's current operating expense for the *preceding* year as shown in the district's annual financial report to the State Department of Education, divided by the average daily membership of resident and nonresident pupils for the *preceding* school year." (Emphasis supplied.)

The financial support payable out of the State Foundation and Equalization Fund is provided in the statutes in stated amounts for each of several categories. Deductions are provided for late reports, *failure to levy taxes in prescribed amounts,* etc. The method used in determining the total base amount due Omaha under sections 4, 5, 7, 8, and 11 of the act appears to have been correct.

The act provided comprehensively for school aid in proportionate amounts to every school district in the state. The act also provided for pro rata funding in the event that the Legislature did not fully fund the act.

We are called upon in this case to construe L. B. 448, and in construing a legislative act resort may be had to the history of its passage. Chicago, B. & Q. R.R. Co. v. Amack, 112 Neb. 437, 199 N. W. 724. A proponent of this bill, Senator Jerome Warner, succinctly stated the reasons and purposes, as pertinent to the issues herein, to the Legislature's Committee on Education as follows: "The following constitute my reasons for this bill and the purposes which are sought to be accomplished there-

by: The purpose of LB 448 is to provide a formula for the distribution of state aid to public school districts. *It is a Foundation Equalization Act.* Under the foundation portion every school district in the state would be eligible to receive the amount of money prescribed in the bill on a per pupil basis, * * *. The *equalization* portion is for the purpose of equalizing costs between school districts. To qualify for equalization aid, a school district must levy a minimum of 22 mills if it is a Class 2, 3, 4 or 5 District; 15 mills for Class 1 District and 12 mills for a Class 6 District. The equalization aid is based upon $450.00 per pupil, one through six, $225.00 for kindergarten, $500.00 grades seven and eight and $550.00 for grades nine through twelve or 108% of the previous years per pupil cost whichever is less. These amounts times the respective number of students in average daily membership in each of the grades minus the other sources of income to the district including the amount raised by the minimum mill levy, the foundation aid and other sources of income, the difference between these equals the equalization aid. * * *

"The bill also has a provision for an appeal procedure made to the State Board of Education to *use the current years average daily membership for a school if it has had an increase in the number of students as prescribed in this bill.*

"The bill also provides for the pro-rating of a fund in proportion to what the district would have received of the full amount in the event that the Legislature appropriates less than the amount necessary for full funding of the bill. * * *

"In addition the bill has an over-all limit in the increase in per pupil cost per year which is for the purpose of insuring that any state aid is *used to reduce local mill levy and is not just additional spending by the local district. This is to insure the concept of replacement of local property tax.*" (Emphasis supplied.)

It would unduly lengthen this opinion to fully de-

scribe the background of the different types of grants under the act. We will refer to them as the foundation grant, the incentive grant, and the equalization grant. Pursuant to the data furnished the State Board of Education under the prescribed application forms for the grant, the Omaha calculation appears to be as follows:

Foundation grant, 79-1334	-	$ 1,622,761.80
Incentive grant, 79-1340	-	458,862.00
Equalization grant, 79-1336	-	$27,626,756.00
plus 79-1337		752,031.25
		$28,378,787.25
less 79-1338		14,057,272.07
		$14,321,515.18

In other words, if L.B. 448 had been fully funded and if the School District of Omaha had not exceeded the 8 percent limitation of section 79-1341, R. S. Supp., 1967 (section 12, L.B. 448), the School District of Omaha would have received $14,321,515.18 in equalization aid. Because the act did not fully fund, the pro rata share funds amounted to $5,661,999. This figure was reduced to $4,165,114 because section 79-1341, R. S. Supp., 1967 (section 12 of the act), provides that the per pupil cost may not increase more than 8 percent above the average cost for the preceding year of 1967-68.

With this background, we approach the first issue of the case. It is whether or not the limitation section, 79-1341, R. S. Supp., 1967 (section 12 of the act), is applicable. "Sec. 12. For a district in which *actual* per pupil cost, in any *particular* year, exceeds the total financial support prescribed by sections 7, 8, and 11 of this act the following limitation shall apply: Notwithstanding the grant provisions of sections 4, 5, 7, 8, and 11 of this act, funds received under this act, when added to operating funds received from all other sources, shall not exceed the larger of the following amounts:

"(1) The sum necessary to support an increase in

per pupil expenditures which, when added to the increases and decreases of the four preceding fiscal years, results in a mean annual increase in per pupil costs for the five-year period of eight per cent; or

"(2) The sum necessary to support a per pupil cost eight per cent above that of the preceding year; *Provided,* a district which may suffer undue financial hardship because of such limitations, such hardship being a result of an abnormal change in enrollment, depreciation in the value of school properties, alteration of property values within the district, or other abnormalities or emergencies of similar magnitude or consequence may file a written application for relief with the State Board of Education, which may grant whatever relief, if any, it deems appropriate by altering the percentage limitations of this section."

The exact issue in this case involves the distribution of funds for the 1968-69 school year. We feel that it is self-evident and that the "particular year" referred to in the statute means the 1968-69 school year. This appears, from the record, to have been the year considered both by the School District of Omaha and the State Board of Education at the hearing before the State Board of Education, such hearing being instigated by the Omaha School District for the only purpose of securing relief under the hardship issue of the act. The district court, although finding erroneously that section 12 did not apply, did find in its memorandum order after its hearing on appeal that the *particular* year involved in the computation was the 1968-69 school year.

To arrive at the limitation on the amount due the Omaha School District we must determine the per pupil cost. Unless the context otherwise requires, we must take the district's current operating expense for the *preceding* year (1967-68) and divide it by the average daily membership of resident and non-resident pupils for the *preceding* school year (1967-68). The financial support payable for 1968-69 can only exceed by up to 8

percent (section 12, subsection (2)) the sum necessary to support a per pupil cost for 1967-68, the total of which would be the cost per each individual pupil multiplied by the number of pupils.

The district court held that the *actual* per pupil cost meant the *total* per pupil cost for 1967-68. Naturally, the *total* per pupil cost for 1967-68 could not exceed by 8 percent nor any other amount the already determined per pupil cost for 1967-68. The only logical possible conclusion is that *actual* per pupil cost means the *actual* per pupil cost for the *particular* year for which the distribution is being figured, to wit 1968-69. The context requires this construction. If it does not, the word *actual* means nothing and we are saying that the total per pupil cost does not exceed the total per pupil cost, therefore the limitation does not apply because it is not 8 percent more than the per pupil cost. We would be comparing total per pupil cost for 1967-68 with total per pupil cost for 1967-68.

It is elementary that a statute must be given a reasonable construction to accomplish the objectives and purposes of the act. It appears that the limitation section is designed to accomplish equalization of the aid among all the school districts and not permit arbitrary increases in the per pupil cost at the expense of the other school districts in the state. The 8 percent limitation is designed to insure this equalization and it seems to us that such a provision is fundamental to the purposes of the act. A chaotic condition could easily result from permitting an unlimited increase in costs by the different districts in order to secure the maximum aid possible.

The semantical analysis of the language of the different sections of the act supports our conclusion. Any difficulty with reference to the meaning of per pupil cost is eliminated in all of the other sections of the act besides section 12, because each section of the act (except section 12) in itself defines per pupil cost as meaning the per pupil cost in the next preceding year. Under

section 2, 79-1331, R. S. Supp., 1967, the definition of per pupil cost would have required the same interpretation actually spelled out, *unless the context otherwise required.* We note in only one place in the act is the term *"actual per pupil cost in any particular year"* used. We assume that the Legislature, by using a different phraseology in this section of the statute intended to give meaning to the admonition contained in section 2 that per pupil cost might and should be construed in light of the context. As we have pointed out the words *"actual"* and *"particular year"* could only refer in a meaningful sense to a comparison to the years 1968-69.

This act was designed to fit the actual realities of school district financing. It is clear that the amount of the distribution for the *particular* year 1968-69 is *based* upon reports for 1967-68. The reports for 1968-69 will not be filed until after the school year is completed. While the statute does not say that the 8 percent limitation is to be determined by the number of students registered and the budget for 1968-69, that is the only possible source. It would hardly seem logical to say that while payments are to be distributed in December and April of the 1968-69 year they would have to wait until reports for 1968-69 were filed in July and November 1969, following the end of the 1968-69 school year to determine what the actual per pupil cost had been. By October 1968 they will know how many pupils are in school. They will know the amounts of the teachers' salaries. They will have budgeted the amounts needed for all expenses.

To make a rather complex story short, the Legislature told the school districts, in effect, that if they would make a certain minimum levy, provide a certain quality education, the Legislature would appropriate the funds to insure the expense of per pupil cost established in the next preceding year or on the last 5-year average (section 12, subsection (1)). The Legislature also told the school districts that since the total amount they

funded would be divided among all of the school districts in the state they would not permit a sudden or disproportionate increase of their per pupil cost basis. They also sought to enforce the principle that the purpose of state aid was to reduce the local levy and not for the purpose of supplementing it. We therefore hold that the limitation section, section 12, 79-1341, R. S. Supp., 1967, is applicable.

The second issue which was not specifically ruled on by the district court since it held it was not applicable, arises from the following proviso in section 79-1341, R. S. Supp., 1967: *"Provided,* a district which may suffer financial hardship because of such limitations, such hardship being a result of an abnormal change in enrollment, depreciation in the value of school properties, alteration of property values within the district, or other abnormalities or emergencies of similar magnitude or consequence may file a written application for relief with the State Board of Education, which may grant whatever relief, if any, it deems appropriate by altering the percentage limitations of this section." This refers to the 8 percent limitation.

The Omaha School District filed such a written application for relief. It stated that the hardship designations of abnormal change in enrollment, depreciation in value of school properties, and alteration of property values within the district were not applicable. The claim for relief was based upon the last designation to wit "* * * other abnormalities or emergencies of similar magnitude or consequence."

We observe that the computations made by the School District of Omaha in its application for relief under section 12, were on the forms provided it by the State Department of Education. As we have stated the hearing involved solely a request for relief from the 8 percent limitation, section 79-1341, subsection (2), R. S. Supp., 1967. Again, the pro rata funding under the other provisions of the act came to $5,661,999. But the

application of the 8 percent limitation decreased this amount by $1,496,885. Was the action of the State Board of Education arbitrary and unreasonable and does the record support it in denying relief under the hardship clause and enforcing the 8 percent limitation of section 12, subsection (2)? We fail to find in the record any showing or any evidence that the denial was unreasonable, arbitrary, or capricious. The evidence shows, and we agree, that the School District of Omaha, as almost all school districts are, was hard pressed for financial support. The record shows that the State Board of Education agreed that the Omaha School District needed the money and was perhaps suffering from hardship. The record also shows that the State Board of Education received similar applications from some 50 other school districts asking for similar relief. Consequently the State Board of Education properly invoked the equalization principle which is the fundamental provision of the act. It seems clear to us that the board was supported in a finding that the School District of Omaha's hardship was not sufficiently abnormal as to require relief at the expense of the other school districts but was of similar degree and magnitude to those of all of the school districts whose applications have been denied. The burden of proof is upon the applicant for relief and the record is devoid of any showing that the School District of Omaha was being discriminated against. The board voted 5 to 1 to deny the Omaha application. We will not burden this opinon with a detailed recital of the reasons given by the majority of the board. Not only should considerable weight be given to the findings of the State Board of Education under the generalized powers granted to it under this section of the act, but we can find no showing that it acted arbitrarily, capriciously, or unreasonably. We assume that the State Board of Education and its staff had the necessary expertise to study the problems of all of the districts having hardship problems. The term "hardship" in the

context of the meaning, purpose, and the funding of this act can only be reached by a comparative study of the hardship of the other school districts in the state. The board made the determination that the case for hardship of the School District of Omaha was not so abnormal as to be above and beyond that of other school districts and require rectification by an allocation of money which would necessarily have to come from the pockets of the other school districts. It is significant that the School District of Omaha could have eliminated its financial hardship by increasing its tax levy by only 2 mills. Even then there was no reduction in its tax levy which is one of the purposes of the act. Its 1967-68 levy was a fraction over 42 mills and the 1968-69 levy was a fraction over 44 mills. The record shows that Kearney levied 55.09 mills, Grand Island 58.43, Hemingford 94.44, St. Edward 64.63, Merriman 107.48, Valentine 68.04, and Lincoln 55.32. Not without weight is the observation of a board member who stated that if the application of the School District of Omaha were granted then all of the other cases would have to be opened up and again the board would be faced with a problem. Consequently, the limitation section of the statute was followed which in effect is a format for the board to use in determining equality among the various school districts.

For these reasons we hold that section 79-1341, R. S. Supp., 1967, section 12 of L.B. 448 is applicable to the School District of Omaha in this case and that the action of the State Board of Education in denying relief from the 8 percent limitation is sustained by the record and is not arbitrary, capricious, or unreasonable.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the petition on appeal of the School District of Omaha.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

The term, "per pupil cost," is defined in section 79-

1331, R. S. Supp., 1967, to mean the current operating expense for the *preceding year* divided by the average daily membership for the *preceding school year.* Thus, the "actual per pupil cost, in any particular year," is by definition the per pupil cost for the year preceding the particular year.

The term is used in only two sections of the 1967 act. There is nothing in the context of the act that requires or justifies a construction that ignores the definition set out in the act.

Section 79-1341, R. S. Supp., 1967, requires a comparison of the *actual* (not estimated) cost for 1967-68 with the total financial support prescribed for 1968-69. Cost on a per pupil basis cannot be compared with total financial support. It is necessary, as the trial court found, to compare total operating cost with total financial support. Since the former does not exceed the latter, the limitation prescribed in the section is not applicable.

The majority opinion suggests that "a chaotic condition could easily result from permitting an unlimited increase in costs by the different districts in order to secure the maximum aid possible." The only districts that could receive increased aid through increased expenditures, under the 1967 act, were those districts in which per pupil expenditures fell below the amounts specified in section 79-1336, R. S. Supp., 1967. Both limitation provisions have now been repealed. See Laws 1969, c. 467, p. 1621.

In my view of the case, it is not necesasry to reach the hardship issue.

McCOWN, J., joins in this dissent.

SMITH and McCOWN, JJ., dissenting.

The majority opinion misconstrues the statute. It gives the issue of undue hardship short shrift. We concur with the dissenting opinion by Boslaugh, J., regarding statutory construction, but we also dissent respecting the hardship issue.

The majority opinion states that the purpose of the

act was to provide comprehensive school aid in proportionate amounts to every school district in the state. We do not so read the text, and these facts cast a shadow over the majority view: In the fall of 1969 Nebraska led all other states in the numbers of operating and nonoperating school districts—1,420 and 400 respectively. See Simon and Grant, U.S. Department of Health, Education and Welfare Digest of Educational Statistics (1970).

We turn to the opening clause of section 12 of the act. The majority opinion insists that 1968-69 is the year for determination of actual pupil cost; yet it uses operating costs and average pupil membership in 1967-68 to make that determination. The approach is incorrect. It appears either to invert the statutory relationship between actual pupil cost and total financial support or to read the opening clause completely out of the act.

We are told that any other construction of the opening clause of section 12 would make the relationship between cost and support every year an invariable. The argument overlooks a fair construction of the statute: Prescribed support for one year would become an item of cost the next year.

Other states have determined school aid in a given year by revenue, costs, and membership in the prior year. See, Mort, Reusser, and Polly, Public School Finance 44-49 and 265; Johns and Morphet, Financing the Public Schools 283 (1960); Zenith School District No. 32 v. Peterson, 81 N. W. 2d 764 (N. D., 1957).

At the hearing before the state board on the issue of undue hardship, the Omaha district appeared by its president, Charles A. Peters, and its superintendent, Dr. Owen A. Knutzen. The board elicited minor instances of inefficiency, and greater inefficiency was probably inherent in a district of that size. One-half of all children in public schools of America attended schools located in 50 districts. Omaha ranked 38th.

Its student membership formed 20 percent of the state total and 90 percent of the Blacks.

The tragic plight of disadvantaged children in large urban school districts across the nation was well known. An urban crisis struck Omaha. In the year of passage of the state aid act one student was killed. Students boycotted schools. The buildings became targets of racial disturbances.

Dr. Knutzen poignantly declared: ". . . the fact of life is that we live today and for these children tomorrow. We cannot undo . . . yesterday . . .. Omaha . . . has 50 percent of all A.D.C. (child welfare) cases in Nebraska . . .. If that doesn't . . . spell human disaster in the consequences of the cost, I don't know what would." The burden of meeting the emergency fell upon the 1968-69 budget. The evidence stood unchallenged.

The technical staff of the Commissioner of Education for Nebraska recommended distribution of the money to Omaha on account of undue hardship. The commissioner, Dr. Floyd A. Miller, concurred, and he conveyed his recommendation to the board.

Sitting on the board was Robert G. Simmons, Jr., a resident of Scottsbluff and a practicing lawyer admitted to the bar in 1941. At the hearing this dialogue occurred: "Peters: . . . But . . . because we attempted to solve the problem, you are saying no . . .. Simmons: The Legislature said that . . . That's the trouble with the Omaha people, you don't realize that you are part of the State of Nebraska."

It is our opinion that this court misconstrues the statute and that the state board acted arbitrarily. We would affirm the judgment of the district court, reaffirming School District of Omaha v. State Board of Education, 186 Neb. 170, 181 N. W. 2d 861 (1970).

CLINTON, J., concurring.

I concur in the majority opinion. I add the following.

At the hearing before the State Board of Education,

both it and the plaintiff school district construed the statute to make section 12 and its limitations applicable to the plaintiff. Its application for relief under the "hardship" provision was founded on the premise that the limitation of the section was applicable. Its appeal to the district court was primarily on that premise.

The legislative intent is to be sought, first of all, within the bounds of the statute itself. Set forth following are: 1. A draft of the statute as it ought to read if the plaintiff's present contention were correct. 2. A draft rewritten in accordance with the practical construction placed upon it by both parties until otherwise interpreted by the trial court, which draft also contains my interpretative comments.

Section 12, if drafted in accordance with the plaintiff's present contention that "actual per pupil cost, in any particular year" means per pupil cost in the year preceding the year for which aid is being computed, would read as follows. The portions in brackets and/or parentheses indicate the changes required by such contention.

> "For a district in which actual per pupil cost [for the year preceding the year for which aid is being computed (or is to be paid)], exceeds the total financial support prescribed [for the year for which aid is being computed (or is to be paid)], by sections 7, 8, and 11 of this act the following limitation shall apply: Notwithstanding the grant provisions of sections 4, 5, 7, 8, and 11 of this act, funds received under this act [in the aid year], when added to operating funds received [in the aid year] from all other sources, shall not exceed the larger of the following amounts:
>
> (1) [Not applicable]; or
>
> (2) The sum necessary to support a per pupil cost eight per cent above that of the preceding

year; Provided, (here follow the hardship provisions)."

If section 12 were rewritten in accordance with the practical construction placed upon it by both parties until otherwise interpreted by the trial court, it would read as follows. Interpolated in brackets are my interpretative comments indicating my analysis of all versions, including that of the statute itself.

"For a district in which the per pupil cost for the year in which aid is being computed (or for which it is to be paid), exceeds the total financial support prescribed by sections 7, 8, and 11 [the foregoing clause under any version of the section can only refer to the year for which aid is being paid], of this act the following limitation shall apply: Notwithstanding the grant provisions of sections 4, 5, 7, 8, and 11 of this act, funds received under this act, [the immediately foregoing clause under any version can only refer to year for which aid is being paid], when added to operating funds received from all other sources [again this clause under any version can refer only to the aid year (and most significantly determination of operating funds must be based upon budget figures and not actual expenditures)], shall not exceed the larger of the following amounts:

(1) [Not applicable]; or

(2) The sum necessary to support a per pupil cost eight per cent above that of the preceding year."

Plaintiff concedes in its brief, page 29, under its theory of a condition precedent, that to read the section literally results in an absurdity. It then proposes to solve the quandry by reading something into the statute that is not there. This is a concession by it, at least, that the section is ambiguous. It therefore must be analyzed to try to determine the legislative intent.

From the analyses of section 12, which I have set forth earlier, it seems apparent to me that where this

section speaks of "actual per pupil cost, in any particular year," it is referring to a cost based upon budget figures for the aid year and a per pupil cost for the year based upon that budget.

I say this because based upon the analyses it is, to me, indisputable that the clause "the total financial support prescribed by sections 7, 8, and 11" necessarily refers to the support for the aid year, for it, by the very context, relates to the phrase "in any particular year". Therefore the phrase "in any particular year" refers to the year for which aid is being computed. The original opinion in this case concedes this.

Even more conclusive, in my judgment, is the relation of the phrase "in any particular year" to the clause "funds received under this act." It obviously refers to funds received in the aid year and that under the statute is "in any particular year."

Then we get to the clause "when added to operating funds received from all other sources." It is apparent that the determination of these funds can be made only with reference to the budget figures. Yet surely the statute is referring again necessarily to "funds received from all other sources" "in any particular year."

The plaintiff's interpretation of the statute necessarily requires that the phrase "in any particular year" be used in the very same sentence to mean both "the preceding year" and "the year for which aid is being computed and funds received" (quotation marks supplied on the last). This obviously cannot be. It necessarily follows that in this section the term "actual per pupil cost" must, because of the context, not be equated with the definition in subsection (3) of section 2.

The three clauses or phrases by the very language of the act refer to matters which are determinable only with reference to the aid year and by the terms of the section all relate back to "any particular year." It seems to me that it follows as night the day that "actual per pupil cost in any particular year" can refer only

to a cost based upon the aid year budget. The one term (used only once) cannot have two meanings in the same sentence.

The uncontradicted evidence is that the plaintiff in its application, exhibit 3, to the State Board of Education for aid computed its estimated per pupil cost for 1968-69 as $494.42. It used that figure to determine the applicability of the limitation of section 12. Total financial support per pupil under sections 7, 8, and 11 would be $465.31 or $476.81. See original opinion, 186 Neb. 178, 181 N. W. 2d 861, 863. The 108 percent of the per pupil cost for 1967-68 was $469.67 and this constituted the limitation for 1968-69. Section 12 did apply to plaintiff.

Additionally we offer the following grounds for reversal. A party may not on review change the theory on which the case was tried or the ground or action of defense relied upon by him below. 5 C. J. S., Appeal & Error, § 1503, p. 863. Before the State Board of Education, its theory was the section 12 limitation applied. In addition, both the State Board of Education and the plaintiff interpreted the section 12 limitation to apply. Contemporaneous construction may be considered by the court. 82 C. J. S., Statutes, § 357, p. 758. See, also, State v. Equitable Life Assur. Soc., 68 N. D. 641, 282 N. W. 411. The case of Zenith School District No. 32 v. Peterson (N. D.), 81 N. W. 2d 764, cited in the dissenting opinion of Judge Smith has no application. The reversal of the judgment of the trial court is required.

ROBERT JOHNSON, APPELLANT, V. EMMETT J. DENNIS, JR., DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

187 N. W. 2d 605

Filed June 4, 1971. No. 37815.

Implied Consent Law: Intoxicating Liquors: Motor Vehicles. A failure to reply to a direct inquiry as to which test should be administered, as provided in the Implied Consent Act, under the circumstances in this case, was equivalent to a refusal to take any of the tests.

Appeal from the district court for Fillmore County: Joseph Ach, Judge. Affirmed.

Walter C. O'Neal, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The plaintiff, Robert Johnson, appeals from a judgment affirming the order of the Director of the Department of Motor Vehicles revoking the motor vehicle operator's license of plaintiff under the Implied Consent Act. The question presented is whether the evidence is sufficient to sustain the finding by the trial court that the plaintiff refused to submit to the test provided in section 39-727.03, R. R. S. 1943.

The record shows that the plaintiff was arrested by a state patrolman for operating a motor vehicle while under the influence of alcoholic liquor. He was taken to the sheriff's office at Geneva, Nebraska, and advised that he had the right to an attorney and the right to remain silent. He was also advised concerning the Implied Consent Act and asked if he wanted to give the officer a blood or urine sample. The plaintiff replied that he would give a urine specimen and was handed a bottle by the officer. The plaintiff then said he would

not give a urine sample, handed the bottle back to the officer, and asked to call his attorney. The attorney was called and came to the sheriff's office. The officer again asked the plaintiff if he would give a urine sample or a blood sample. The plaintiff's attorney advised the plaintiff to remain silent and the plaintiff made no reply to the inquiry. No further attempt was made to obtain a specimen.

The plaintiff contends that silence is not a refusal and that the plaintiff had not withdrawn his implied consent to a blood test. As we view the record, the plaintiff withdrew his consent to a blood test when he elected to furnish a urine sample. When he changed his mind and refused to give the urine specimen, his refusal to submit to a test was complete.

The plaintiff argues that the officer should have arranged for a physician to come to the sheriff's office so that an attempt could have been made to withdraw a blood sample from the plaintiff's body. The plaintiff's theory is that the officer should have assumed that the plaintiff would allow a blood sample to be taken and that the plaintiff's silence in the face of a direct inquiry could not be considered a refusal.

Section 39-727.04, R. R. S. 1943, provides that the person arrested may choose the test to be performed. Silence in the face of a direct inquiry as to which test should be administered, under the circumstances in this case, was equivalent to an express refusal to submit to any test. See Buda v. Fulton, 261 Iowa 981, 157 N. W. 2d 336, holding total failure to cooperate equivalent to a refusal. See, also, Blattner v. Tofany, 312 N. Y. S. 2d 173, 34 App. Div. 2d 1066; State v. Pandoli, 109 N. J. Super. 1, 262 A. 2d 41; Campbell v. Superior Court (Ariz.), 479 P. 2d 685; DiSalvo v. Williamson (R. I.), 259 A. 2d 671; Clancy v. Kelly, 180 N. Y. S. 2d 923, 7 App. Div. 2d 820.

Mills v. Swanson, 93 Idaho 279, 460 P. 2d 704, cited by the plaintiff, involved a driver who had been injured

and was dazed. The statutory provision regarding a person who is unconscious or otherwise incapable of refusal, section 39-727.05, R. R. S. 1943, was not applicable here.

The evidence sustains the finding of the trial court that the plaintiff refused to submit to the test required by law. The judgment of the district court is affirmed.

AFFIRMED.

WILLIAM LYDICK ET AL., APPELLANTS, V. INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLEE.
187 N. W. 2d 602

Filed June 4, 1971. No. 37839.

1. **Insurance: Contracts.** A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.
2. ———: ———. Where an insurance policy limits liability to direct loss or damage, the general rule is that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss, the insured may not recover.

Appeal from the district court for Burt County: MERRITT C. WARREN, Judge. Affirmed.

J. William Gallup of Schrempp & Bruckner, for appellants.

C. L. Robinson of Fitzgerald, Brown, Leahy, McGill & Strom, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an action at law by the plaintiffs, William Lydick and James Lydick, upon a policy of insurance issued by the defendant, Insurance Company of North America, to recover the value of certain cattle alleged

to have been destroyed as the direct result of a windstorm. The district court sustained a motion for a summary judgment in favor of the defendant and dismissed the action. On appeal we affirm the judgment of the district court dismissing the action.

There is no genuine issue of fact in this case. The plaintiffs' case rests upon their undisputed testimony. The defendant introduced no evidence. The plaintiffs, William Lydick and James Lydick, are partners involved in farming and in cattle feeding. About 9 or 10 o'clock in the morning on January 2, 1969, James Lydick went to the feed lot to tend to the cattle and found 99 of them dead in a pond located on the feed lot. The wind, at the time the cattle were found in the water, was blowing at a rate of 30 miles per hour with gusts up to 40 to 50 miles per hour as it had been the day before. The plaintiffs testified that the cattle descended into the sheltered area around the ice-covered pond because of the cold and the wind. William Lydick also testified that they never would have gone onto the ice if it had not been covered with snow and if the wind had not been blowing. The cattle broke through the ice into the water before the plaintiff, James Lydick, arrived at the pond, and it was his opinion that this happened in the middle of the night of January 1-2, 1969. Snow had covered the pond all winter since the first snow, but the night of January 1-2, 1969, was the first time any cattle had gone onto the ice.

The weather was extremely cold. The plaintiff, William Lydick, stated that in his opinion it was quite a little below zero; that down the banks and around the pond it was probably 15 to 20 degrees warmer; that the cattle were seeking shelter from the wind and the cold; and that there were 3 or 4 inches of snow on the pond.

As to the immediate cause of the cattle breaking through the ice, the plaintiff, William Lydick, testified as follows: "Q. These cattle, are they willing to go out onto the ice? A. No, these cattle would never have

gone out if it wasn't snow out there. They won't hardly go on ice. The pond at this particular time was covered with about three or four inches of snow, I don't know exactly."

The pertinent provisions of the policy provide: "* * * this Policy is Extended to Insure against *Direct* loss by Windstorm, Hail, Explosion, * * *.

"Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by *frost* or *cold weather* or *ice* (other than hail), snow or sleet, *whether* driven by *wind* or not. * * *

"This Company shall not be liable for any loss to livestock or poultry caused in whole or in part by *running into streams or ditches* or against fences or other objects, or from smothering; nor for loss as the direct or indirect result of fright, howsoever caused. * * *

"Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: * * * (e) poultry, horses, mules, cattle, swine and sheep *caused by freezing or smothering in blizzards or snowstorms.*" (Emphasis supplied.)

The undisputed facts in this case automatically place themselves apposite the insuring and exclusionary clauses. At the risk of analyzing the obvious, we observe that the loss of the cattle was not caused *directly* by the wind in the sense that the wind itself damaged the cattle by throwing them to the ground, over a cliff, or causing another object to strike them. The evidence demonstrates that the loss of these cattle was due to a combination of different factors and that the wind was merely one of the prior conditions contributing to the loss.

The policy insures against *direct* loss only. As the trial court cogently observed there were many other antecedent and contributing factors that produced this loss. The important one, of course, was the extreme cold to which the plaintiffs themselves testified, but

for its existence, the loss would not have occurred. It would not have occurred but for the fact that the most convenient and available shelter was in a depression where there was an ice-covered pond; it would not have occurred but for the frozen ice covering the pond; and even more important, it would not have occurred but for the fact that there were 3 or 4 inches of snow which covered the ice so the cattle would be willing to venture on it; nor would it have occurred but for the fact that the ice was too thin to support the weight of the cattle; and the evidence shows that more than 100 head of these cattle gathered at the same time on the thin ice and collectively produced the fall-through into the water that caused their death. Under these circumstances we agree with the district court in holding that the loss, at most, was not directly caused by the wind.

The immediate and direct cause of the loss in this case was the collapse of the ice on which the cattle stood. The cold wind, by maximum inference, merely created an antecedent and preliminary condition which contributed to their wandering upon the snow-covered ice, and thus can only be considered as an indirect cause. In the context of this case the meaning of "direct causation" is defined aptly in Lorio v. Aetna Insurance Co. (La. App.), 220 So. 2d 781, a quite similar case involving an interpretation of a windstorm exclusionary clause. There the court said as follows: "The term 'directly resulting from' has not been heretofore construed by the courts of this state. In so doing, we must give to those words their ordinary significance. 'Directly', as defined in Webster's New Collegiate Dictionary, 1961 edition, means 'In a direct manner, without anything intervening.' 'Intervene' means '1. To enter or appear as an irrelevant or extraneous feature or circumstance; to come (in between). 2. To occur, fall or come between points of time or events.' 'Result' means 'To proceed, spring or arise, as a consequence, effect or conclusion.'

"From the above, we conclude that death 'directly resulting from' some event would mean a death which is caused by or is a consequence of an event and which would have occurred without the existence or intrusion of other causes or conditions unrelated to the original event."

The same conclusion follows from the policy provision which specifically excluded damages caused by cold weather, ice, or snow, whether driven by wind or not. As we analyze the plaintiff's evidence, their entire theory is that the temperature was warmer in the depressed area of the pond since it was sheltered from the cold wind. They testified positively that the cattle would not have sought shelter if the wind had not been cold. They also testified that the cattle would not have ventured onto the ice had it not been covered with snow. It would appear, therefore, from the testimony of the plaintiffs themselves that the cold and the snow were the important, and probably the dominant factors in causing the cattle to wander onto the ice with the resultant collapse of the ice and the drowning in the pond. The general rule is that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss, the insured may not recover. 44 Am. Jur. 2d, Insurance, § 1393, p. 236; Holmes v. Phenix Ins. Co., 98 F. 240; Hartford Fire Ins. Co. v. Nelson, 64 Kan. 115, 67 P. 440; Abady v. Hanover Fire Ins. Co., 266 F. 2d 362.

Summarizing this case, it is clear that the wind itself did not directly harm the cattle; the most that can be said is that the wind and the cold combined as prior conditions to cause the cattle to seek shelter. This was not in itself dangerous except for the pond in the depression. Even then no injury would have resulted had not the pond been frozen and covered with a large accumulation of snow tempting the cattle to venture onto the ice.

It is clear that the loss suffered by the plaintiffs was

not directly caused by the wind and the holding comes within the exclusionary provisions of the policy. The judgment of the district court is correct and is affirmed.

AFFIRMED.

JOHN MARSHALL, APPELLANT, V. COLUMBUS STEEL SUPPLY, APPELLEE.
187 N. W. 2d 607

Filed June 4, 1971. No. 37849.

Statutes: Workmen's Compensation: Attorneys at Law. Applicability of the workmen's compensation statute providing attorney's fees and a penalty for waiting time for delinquent payments turns largely on the facts of each case.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Moyer & Moyer, for appellant.

Jewell, Otte, Pollock & Gatz, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

An award of the Workmen's Compensation Court en banc denied plaintiff the penalty for waiting time and attorney's fees. On appeal the district court affirmed. Plaintiff appeals.

Plaintiff sustained a compensable injury to his ankle on June 20, 1969. Defendant's compensation carrier paid his medical bills and temporary total disability to October 7 when plaintiff returned to work. On January 21, 1970, plaintiff petitioned the compensation court for relief. He alleged a permanent partial disability to the right foot and leg without specifying a percentage.

Former section 48-121, R. R. S. 1943, then in force, established this schedule: For permanent total loss of use of a foot, 66⅔ percent of daily wages during 150

weeks; for permanent total loss of use of a leg, 66⅔ percent of daily wages during 215 weeks. In all cases involving a permanent partial loss of the use of those members the compensation was to bear such relation to the amounts named as the disabilities bore to those produced by the injuries.

At a hearing before a single judge the compensation court awarded plaintiff $45 a week for 49½ weeks, finding a 33 percent permanent partial disability to the right foot. Defendant failed to appear without any excuse.

On March 11, 1970, defendant applied for a rehearing. After a trial the court en banc decreased the award to $45 a week for 26¼ weeks, finding a 17½ percent permanent partial disability to plaintiff's right foot. It found no penalty or attorney's fees assessable against defendant because a reasonable controversy existed.

An orthopedic surgeon engaged by defendant had reported on February 9, 1970, that plaintiff's injury was a minimal permanent impairment. On March 20 he estimated a 10 percent permanent impairment of the foot which he defined under compensation law to extend from the toes to the knees. Another orthopedic surgeon engaged by counsel for plaintiff found a 25 percent permanent disability of the ankle. Dr. E. N. Heiser, who treated plaintiff at his home in Columbus, did not testify. Brief references to his opinion which were not favorable to plaintiff need not be considered.

Section 48-125, R. R. S. 1943, added a 50 percent penalty for waiting time on all delinquent payments after 30 days' notice. When the employer refused payment, or when he neglected to pay compensation for 30 days after injury, and proceedings were held before the compensation court, the statute allowed the employee a reasonable attorney's fee.

The Legislature intended that an employee would receive payments without delay for trivial reasons. The employer was under a duty to exercise reasonable dili-

gence, but he retained a fair opportunity to a trial of his just controversies. Reasonable certainty of the amount and number of compensation payments was required. See, Gill v. Hrupek, 184 Neb. 436, 168 N. W. 2d 377 (1969); Wheeler v. Northwestern Metal Co., 175 Neb. 841, 124 N. W. 2d 377 (1963); Redfern v. Safeway Stores, Inc., 145 Neb. 288, 16 N. W. 2d 196 (1944); McCrary v. Wolff, 109 Neb. 796, 192 N. W. 237 (1923); Hall v. Germantown State Bank, 105 Neb. 709, 181 N. W. 609 (1921); Osborn v. Omaha Structural Steel Co., 105 Neb. 216, 179 N. W. 1022 (1920). Each case turned largely on its own facts.

In the present case defendant's inexcusable failure to appear before the single judge court weighs heavily. Existence of a reasonable controversy under the circumstances, however, neutralizes neglect on defendant's part.

The cause of plaintiff's justifiable dissatisfaction actually lies elsewhere. Too much litigation which benefits neither employee nor employer is characteristic of the system. Interest in the subject is indicated by the following materials: Report of Judicial Council, 48 Neb. L. Rev. 699 (1968); Report of Committee on Procedure, Nebraska State Bar Association, 43 Neb. L. Rev. 211 (1963); Report of Judicial Council, 42 Neb. L. Rev. 343 (1962); Report of Committee on Legislation, Nebraska State Bar Association, 31 Neb. L. Rev. 307 (1951); Report of Committee on Legislation, Nebraska State Bar Association, 30 Neb. L. Rev. 154 (1950).

It is desirable that the Legislature simplify practice and proceedings in these cases. See Art. V, § 25, Constitution of Nebraska.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MCARTHUR MYLES, APPELLANT.
187 N. W. 2d 584

Filed June 4, 1971. No. 37873.

1. **Criminal Law: Trial: Post Conviction: Attorneys at Law: Appeal and Error.** When an indigent defendant has made known to the court that he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by the court or by lack of action on the part of his attorney.
2. **Criminal Law: Trial: Post Conviction: Pleadings: Evidence.** In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
3. **Criminal Law: Post Conviction: Pleadings: Appeal and Error: Evidence.** When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Stewart, Calkins, Duxbury & Crawford, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a post conviction proceeding. Defendant was tried, convicted, and sentenced on a charge of shooting with intent to kill, wound, or maim. The sentence received has been served but the right of appeal is not moot. See Sibron v. New York (1968), 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917.

In his application to the district court, defendant raised the following questions: (1) Denial of the right of appeal; (2) ineffective assistance of counsel; and (3) denial of the privilege against self-incrimination. At the hearing in the district court and on appeal, the only

question presented is that pertaining to the right of appeal, the others having apparently been abandoned. The judgment of the district court is affirmed.

At the time of sentence, defendant's privately retained lawyer stated to the court that he did not wish to represent the defendant further, but that defendant had no funds and wanted a court-appointed attorney to confer with him about an appeal. The court instructed the attorney to file a poverty affidavit and notice of appeal. This was not done although a motion for new trial had been filed and overruled. The attorney testified that defendant was pleased with the light sentence received and directed him not to proceed with the appeal. The record, however, discloses a letter written by the attorney to defendant 53 days before the time for appeal expired in which he stated an appeal was not taken because there were no valid grounds for it. Defendant was confined in the same city where his attorney practiced and doubtless received notice of the failure to appear in time to protect his rights in that regard. He did nothing until more than 5 months later when a motion to vacate the judgment and sentence was filed. Nevertheless, it is well established that when an indigent defendant has made known to the court that he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by the court or by lack of action on the part of his attorney. See, State v. Williams, 181 Neb. 692, 150 N. W. 2d 260; Coffman v. Bomar, 220 F. Supp. 343; Swenson v. Bosler, 386 U. S. 258, 87 S. Ct. 996, 18 L. Ed. 2d 33.

There is another feature of this case which merits consideration. The legislative bodies and the courts of this country have been at great pains to ensure that an indigent defendant in a criminal action shall be afforded opportunities to defend himself equal to those enjoyed by one financially able to provide for his own defense. As frequently happens when attempts are

made to right existing wrongs, the scales, rather than being balanced, are tipped in the other direction. The pendulum swings too far in the opposite direction. One financing his own defense must determine whether an appeal has sufficient merit to warrant the expenditure of his money for appeal costs and attorney's fees. No such worry besets the indigent. His attitude is that even though his case on appeal is completely without merit, the public, not he, must pay for it, and he has nothing to lose. As a result, if counsel advises him that an appeal is useless because it is lacking in merit, he simply demands the appointment of other counsel. Attorneys representing indigent defendants feel that they must appeal all convictions, however lacking in merit, or be charged with a failure to adequately represent such defendants. On evaluating the situation thus created, we find that, almost without exception, every criminal conviction is appealed, including those resulting from pleas of guilty. The net result is that our courts are overburdened and judicial processes clogged with baseless litigation. Judges thus harassed must cope with ever increasing burdens and the demands upon their time are such that they cannot give adequate consideration to those cases which do have a meritorious basis. Of necessity, this adversely affects the defendant who appeals in good faith.

Although it is conceded that our courts are endowed with rule-making powers, some jurisdictions have provided by statute that an appeal shall not be taken except where it is done on a good-faith basis and has some merit. Frivolous appeals are summarily dismissed. It was held in Gershon v. United States, 243 F. 2d 527 (8th Cir., 1957), that a court is not required to grant leave to a defendant to appeal in forma pauperis where it is obvious that the appeal is doomed to futility. See, also, Hayes v. United States, 258 F. 2d 400 (5th Cir., 1958); Ingram v. United States, 315 F. 2d 29 (D. C. Cir., 1962).

In the present instance, defendant simply says he

had wished to appeal his original conviction and was wrongfully denied that right. He does not allege, and the record does not reveal, facts showing meritorious grounds for the appeal, nor does he contend that he was innocent. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief. See State v. Coffen, 184 Neb. 254, 166 N. W. 2d 593. When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof.

The judgment of the district court is affirmed.

AFFIRMED.

LORABELLE M. HANSON, APPELLEE, V. RICHARD HANSON, APPELLANT.
187 N. W. 2d 647

Filed June 11, 1971. No. 37770.

Divorce: Parent and Child: Appeal and Error: Evidence. The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed as modified.

Healey, Healey, Brown & Burchard, for appellant.

Donald R. Hays, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a petition for the modification of a divorce

decree in which the defendant husband now seeks custody of two minor children of the parties, a girl age 10 and a boy 9 years of age. From a decree denying the application, and continuing the custody of the two children to the plaintiff mother under the supervision and direction of the juvenile court, the defendant appeals. We affirm the judgment of the trial court.

In proceedings of this nature we feel that a detailed recital of the evidence would serve no useful purpose. We have reviewed the record and briefly summarize the facts. The gist of the defendant husband's contention is that the plaintiff had engaged in post-divorce sexual relations which require that she be deprived of the custody of her two minor children and that it be transferred to the defendant husband, who has now remarried. There is also evidence in the record that the defendant husband has engaged in post-divorce sexual relations with the plaintiff and that he has been dilatory and failed to pay the child support judgment in the sum of $50 per month for each child. The evidence sustains the trial court's finding that the plaintiff has properly cared for these children and that her conduct has been above reproach except for her sexual conduct with two other men. It also sustains by a preponderance of the evidence that the improper conduct of plaintiff in this respect was not known to the children nor has it adversely affected the children as to their care, education, or training. The evidence affirmatively shows that the plaintiff has provided for the physical needs of her children, has maintained regular employment, and has provided them with appropriate supervision, aided by the supervision of the children's grandmother during the time the plaintiff is working. From the record in this case we come to the same conclusion that the trial court did, that the best interests of the children under all of the circumstances of this case would be served by leaving their custody with the plaintiff at the present time, under the supervision of the chief juvenile pro-

bation officer of the separate juvenile court of Lancaster County. We hold and direct, as the trial court did, that the custody should be under the continual supervision of the juvenile probation officer of Lancaster County who should investigate the care that the children receive and in the event there is default on the part of the plaintiff or that said care appears to be inimical to the best interests of the children then the matter be returned summarily to the court for further hearing.

As we have suggested the cold record before us supports by a preponderance of the evidence the findings and conclusions that the trial court made herein. Particularly appropriate in the context of this case, with the suggestion of the conduct of the mother impinging upon the moral, educational, and physical welfare of the children, is our holding in the recent case of Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667, where in reviewing a trial court's findings in a similar situation this court said as follows: "We have, of course, given weight to the findings and judgment of the trial court. The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the best interests of children in custody proceedings." We have further recently said in Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544, with reference to the scope of judicial review of custody orders by this court as follows: "The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence."

We have considered the nature of the acts conceded

to have been committed by the plaintiff, and the circumstances surrounding the commission of the offenses. As the trial court found they were freely and forthrightly testified to by the plaintiff herself in the course of the trial. We have examined the probable effects of the offenses as they relate to the future welfare of the children and the best interests of the children under all of the circumstances of the case. We agree that the children should remain with the plaintiff, with the provisions for supervision carefully prescribed by the separate juvenile court's decree. We further feel that the enforcement of the decree will be strengthened by adding a provision transferring the legal custody of the children to the separate juvenile court. The close supervision of these children in the home contemplated by the court in its decree requires, at least temporarily, that the court retain power to act summarily herein and at the same time the best interests of the children will be served by giving the plaintiff a further opportunity to demonstrate the reformation of her conduct. We observe further that the court will retain a continuing jurisdiction to return the full legal custody to the plaintiff if and when the court in its judgment determines that circumstances warrant such a disposition.

The judgment of the trial court denying a modification of the decree to change the custody to the defendant is affirmed. The decree otherwise is affirmed except to provide the legal custody of the children be transferred to the separate juvenile court of Lancaster County, Nebraska.

The trial court ordered that each party pay his own costs and attorneys' fees, and we have come to the same conclusion as to costs and attorneys' fees in this court.

AFFIRMED AS MODIFIED.

JOHN CONN, APPELLEE, V. ITL, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.
187 N. W. 2d 641

Filed June 11, 1971. No. 37778.

1. **Witnesses: Trial.** A party calling a witness does not vouch for credibility of the witness.
2. **Workmen's Compensation: Evidence.** A workmen's compensation claimant, unaided by presumption, bears the burden of proof that his employment in fact caused a compensable injury.
3. ———: ———. A workmen's compensation claimant with atherosclerosis which was a personal risk and a cause of an otherwise compensable injury may recover under these circumstances: An employment risk greater than that of ordinary nonemployment life was a cause of the injury.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellants.

Orie C. Adcock, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The Workmen's Compensation Court dividing on rehearing decided that a myocardial infarction suffered by plaintiff was compensable notwithstanding preexistence of a sclerotic coronary artery. It found total disability from June 18, 1968, to January 13, 1970, and for an indefinite future time. On appeal the district court affirmed. Plaintiff's employer, ITL, Inc., and its insurer, defendants, appeal. Chief issues concern employment causation and total disability.

On June 17, 1968, plaintiff's duty in defendant's employ was to operate a truck tractor which pulled a semitrailer. Plaintiff also was to distribute the cargo, groceries, at stores of Associated Grocers, "AG," and to help unload the groceries. Age 42, he had been driving

trucks 23 years but only 3 weeks for ITL. That morning he went to an AG warehouse to connect his tractor with a refrigerator semitrailer.

Plaintiff's version of events is as follows: The semitrailer was dollied too high for its kingpin and the nonhydraulic fifth wheel of the tractor to be coupled. Having moved wooden skids into place to elevate the rear of the tractor, plaintiff backed it on the skids. He still could not connect the kingpin and the fifth wheel. He then stepped out of the tractor to crank the dolly in low gear to lower the semitrailer. To do so he had to reach up. He testified: "I couldn't move it and I was putting all my efforts into it and straining and I still couldn't lower the dollies, so I stopped and rested . . . several times. . . . this is where . . . a terrible pain hit me here in the chest which went down through both arms. I couldn't breathe and I was just in a cold sweat . . . and I . . . slid down . . . in next to the drivers on my tractor . . . ."

Plaintiff in his case-in-chief called two other witnesses. One, a catalog expediter for AG, on cross-examination conceded that plaintiff's cranking had appeared no harder than had been usual. Plaintiff completed the coupling and walked unassisted to the coffee room where he first complained of chest pain. The other witness was spotting trailers for AG. According to him plaintiff was rolling down the dollies with nothing unusual appearing.

Plaintiff was taken to the office of Dr. William Gentry, a physician and surgeon, at Gering. Plaintiff narrated a history of no prior illness related to his present condition, of no prior heart attack. He complained of pain in the left chest radiating into both arms, gas, and fullness in the epigastrium. The pain had begun an hour earlier, and it had not ceased. He had experienced frequent episodes of gas associated with dyspnea the last 6 months. The manager of ITL testified that en route to Dr. Gentry's office plaintiff had admitted suffering chest pains the preceding 2 or 3 days.

Having examined plaintiff and administered demerol, Dr. Gentry ordered him confined in the intensive care unit of the West Nebraska General Hospital. He left an order for covmadin and demerol as they were needed. Among the tests taken were electrocardiograph, blood enzymes, and chest X-ray. Electrocardiograms, "EKGs," were obtained on the 17th, 18th, 19th, and 22nd. Blood enzymes, which were tested on the 17th, 18th, and 21st, were normal. The sedimentation rate, which was taken on the 17th, was normal. The chest was fluoroscoped on the 24th. Early EKGs were normal except a slight peaking of the P wave. Subsequent EKGs disclosed a flattening out of the P wave and a condition within normal limits. Plaintiff was discharged from the hospital on June 24.

In the opinion of Dr. Gentry plaintiff had not suffered a heart attack or myocardial infarction. Dr. Gentry diagnosed gouty arthritis and peptic ulcer. The diagnosis rested on the absence of objective evidence of heart injury, elevation of the uric acid, and X-rays of the "upper G.I. tract."

Following removal of his family to Las Vegas, Nevada, plaintiff joined them about July 5, 1968. His chest pain was continuing. One hospital refused to admit him because he could not pay. The county physician subsequently admitted him to Southern Memorial Hospital in Las Vegas, and Dr. John A. DiFiore began treating plaintiff on July 22.

Dr. DiFiore testified by deposition. An internist, he had specialized in cardiology and treatment of cardiovascular diseases for 23 years. He was Governor for Nevada of the American College of Cardiology. Plaintiff had related these complaints and history: Pain high in the substernal area, and at the root and front of the neck, a condition causing shortness of breath and perspiration; a deep ache in the left arm down into the fingers of the left hand; the injury on June 17, 1968; and the hospitalization.

Dr. DiFiore prescribed an anticoagulant, morphine, demerol, a tranquilizer, potassium iodide, atropine, "A.P.C." tablets, milk of magnesia, and seconal. He ordered these tests: Repeated EKGs, blood enzymes, blood chemistries, prothrombin, Lee-White clotting time, chest X-rays, Panel Ten, blood cholesterol, calcium, thyroid, and on May 27, 1969, a coronary arteriogram.

In the opinion of Dr. DiFiore the EKGs obtained in Nebraska were not within normal limits. He presumed that plaintiff had undergone sclerotic changes in the right coronary artery. The arteriogram, 250 feet long, disclosed only one point of abnormality—an occlusion of the artery. Plaintiff had sustained a myocardial infarction that was atypical and caused by the unusual effort in trying to crank the dolly. Dr. Difiore testified: ". . . on 6/17/68 . . . he suffered his first chest pain, which came from the heart as a result of a disturbance of the blood circulation to the heart muscle, and . . . at that time some muscular damage was most likely incurred . . .. I determined . . . that this man had suffered an acute myocardial infarction some time between June 17, '68, and his admission to our hospital . . .. My opinion is that because of the unusual effort . . . on 6/17/68 . . . he suffered acute ischemia to his heart muscle . . ., and because of the ischemia . . ., over a slow process, . . . a myocardial infarction had occurred, all stemming from the unusual effort, again, on 6/17/68." Plaintiff's disability was such that Dr. DiFiore would permit plaintiff to drive a truck but not to lift more than 15 pounds.

Plaintiff was examined on September 9, 1969, at defendants' request by Dr. Otto A. Wurl, who had specialized in cardiology 15 years. Dr. Wurl testified by deposition: Plaintiff had exhibited symptoms of coronary heart disease—atherosclerosis or hardening of the arteries—when the Nebraska hospital had admitted him. Natural progress of the disease process caused the pain plaintiff suffered June 17. A pain may be angina pec-

toris of effort, but an occlusion does not result from any kind of external physical effort. Atherosclerosis ordinarily progresses with age. No evidence of damage to the heart muscle existed on June 17, 1968, and the events that day were not a factor in the subsequent myocardial infarction that plaintiff suffered. Dr. Wurl found plaintiff totally disabled.

Defendants contend that (1) plaintiff in calling the two witnesses vouched for their credibility and (2) their testimony, although it was in conflict with that of plaintiff, bound plaintiff. They cite Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776 (1962); and Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537 (1961). There are two answers. First, the rule applied only where the contradiction and all other evidence left no question for the trier of fact. Second, a party calling a witness does not vouch for credibility of the witness. See State v. Fronning, 186 Neb. 463, 183 N. W. 2d 920 (1971).

A workmen's compensation claimant, unaided by presumption, bears the burden of proof that his employment in fact caused a compensable injury. See § 48-151 (2), R. R. S. 1943. Such a claimant with atherosclerosis which was a personal risk and a cause of an otherwise compensable injury may recover under these circumstances: An employment risk greater than that of ordinary nonemployment life was a cause of the injury. See Beck v. State, 184 Neb. 477, 168 N. W. 2d 532 (1969).

The evidence supports the finding of permanent disability. See § 48-185, R. R. S. 1943. Plaintiff suffered total disability caused in part by atherosclerosis, a personal risk, and in part by exertion greater than that of ordinary nonemployment life—an employment risk.

The district court allowed plaintiff $500 for services of his counsel. The allowance was not excessive.

The judgment is affirmed. We allow plaintiff $750 for services of his counsel in this court.

AFFIRMED.

CLINTON, J., dissenting.

I dissent respectfully.

Under the provisions of the statute, section 48-151, R. R. S. 1943, the plaintiff must prove by the preponderance of the evidence that he suffered an "injury," which means "only violence to the physical structure of the body and such disease * * * as naturally results therefrom." The terms shall not be construed "to include disability * * * due to natural causes but occurring while the employee is at work, nor to mean *an injury,* disability * * * that is the result of a natural progression of any preexisting condition." (Emphasis supplied.)

In this case it seems clear that the injury must necessarily be the coronary infarction. The majority opinion fairly sets forth the medical evidence, which summarized amounts to this: The initial treating doctor's diagnosis was that claimant did not have an occlusion or infarction on the day of the claimed accident. The treating specialist gave as his opinion that the exertions on the day of the incident lead gradually to the infarction. The nontreating expert gave as his opinion that claimant suffered no infarction on the day alleged and the tenor of his testimony is that an occlusion does not result from external physical effort and in this case there was a natural progression of existing disease. Pain such as the claimant described on the day of the incident may be angina pectoris of effort. There was evidence he had symptoms prior to the day in question. It does not seem to me all this constitutes proof by a preponderance of evidence of an injury "in fact caused by the employment."

Under the statute as amended in 1963 the requirement that the injury be caused by accident was eliminated. This eliminated the accident or the substituted "unusual exertion" requirement which used to exist in some cases. Now in heart cases we talk about a concept of "exertion greater than that of ordinary nonemployment life," which seems to be the equivalent of the

old "unusual exertion" concept which is no longer required, and substitute it as proof of "injury."

The majority opinion comes perilously close to making the employer an insurer in any case where symptoms, such as claimant suffered here, coincide with the exertions of his employment greater than his nonemployment life and disability ultimately occurs. See Beck v. State, 184 Neb. 477, 168 N. W. 2d 532.

I agree that the doctors must say whether the exertion has in fact caused the heart attack, the infarction, "the injury." The conflict of the experts, including that of the original treating doctor, is such that it cannot be said that the claimant has proved that his injury was "in fact caused by the employment." There is no question of credibility of the expert witnesses in this case. What we are called upon to do is solely to judge the expertise of the experts. When we have to do that alone there is no proof by a preponderance of the evidence. Where as here the two specialists testified by deposition, the judgment gets down to measuring the length of the respective pedigrees.

The adoption of pragmatic rules such as exertion greater than that of ordinary nonemployment life in order to obviate the problems of medical proof in cases such as this leads, it seems to me, to further complications. In some cases at least we will be called upon to go into the matter of proof of the exertions of nonemployment life in order to make the necessary comparisons. We already have a pragmatic rule, that is burden of proving by a preponderance of the evidence, given us by the provisions of section 48-151, R. R. S. 1943, and that I believe is sufficient.

WHITE, C. J., and NEWTON, J., join in this dissent.

IN RE 1969-1970 COUNTY TAX LEVY. EVELYN U. WERTH, AND ALL OTHER PROPERTY OWNERS IN THE NONHIGH SCHOOL DISTRICTS OF BUFFALO COUNTY, NEBRASKA, APPELLEE, V. BUFFALO COUNTY BOARD OF EQUALIZATION, APPELLANT.

188 N. W. 2d 442

Filed June 11, 1971. No. 37818.

1. **Taxation: Appeal and Error: Evidence.** The plaintiff taxpayer, appealing under the provisions of section 77-1606, R. R. S. 1943, has the burden of proving that the levy complained of is in fact excessive and illegal.
2. **Taxation: Counties: Schools and School Districts.** The powers of the county board of equalization, under the provisions of the nonresident high school tuition act, are ministerial only and it has no standing to question the discretionary legislative powers of the school district.
3. **Taxation: Constitutional Law: Schools and School Districts.** The true test in setting nonresident high school tuition rates is that laid down in Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729.
4. **Taxation: Counties: Schools and School Districts.** The county board of equalization must, in determining the mill levy under the provisions of the nonresident high school tuition act, deduct from the total requirements of the fund any balance which remains after all claims for the preceding fiscal year have been paid.
5. **Taxation: Legislature: Schools and School Districts.** Unless the Legislature otherwise provides, funds properly expended by a receiving high school district from state and federal aid are includable in the computation of per pupil costs under the provisions of section 79-4,102, R. S. Supp., 1969.
6. **Taxation: Actions: Parties: Schools and School Districts.** In an action which challenges the legality in whole or in part of the levy made under the provisions of the nonresident high school tuition act, the receiving school districts to which the tuition claims will be paid from the fund are necessary parties.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and dismissed.

Andrew J. McMullen, for appellant.

Wilson, Barlow & Watson and Kile W. Johnson, for appellee.

Nye, Wolf & Hove, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal by the Buffalo County Board of Equalization from a judgment of the district court for Buffalo County in which the court declared that a portion of the nonresident high school tuition levy as set by the Board for the fiscal year commencing July 1, 1969, and ending June 30, 1970, was excessive and illegal and directing that refunds be made. We reverse the judgment of the trial court and direct dismissal of the petition of plaintiff-appellee.

The plaintiff, a taxpayer residing in a school district which was subject to the levy, had appealed under the provisions of sections 77-1601 and 77-1606 to 77-1610, R. R. S. 1943, from the action of the Board and asked, among other things, that section 79-4,102, R. S. Supp., 1969, be declared unconstitutional and void. The trial court found the statute constitutional. The plaintiff did not cross-appeal but does here argue unconstitutionality. This point has been decided adversely to the plaintiff in Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729. A reading of that case will be useful in understanding the disposition made on this appeal of other questions raised.

The Board makes nine assignments of error. Two of these it does not argue and these we disregard. The remaining assignments may be condensed as follows: The court erred (1) in receiving any evidence under the plaintiff's petition because the affected receiving high school districts were necessary parties defendant and had not been joined; (2) in holding that the Board had power to change the amount determined to be the proper per pupil cost for nonresident students by the receiving high school districts; and (3) in holding that the levy made by the Board was excessive and contrary to law.

The plaintiff alleged: (1) The levy was made in reliance upon erroneous and unlawful certifications to the Board by the county superintendent of the number of applications received by the superintendent for nonresident high school privileges under section 79-4,105, R. R. S. 1943; that 225 applications had been certified but that 225 applications had not in fact been received by the superintendent prior to July 1, 1969; and that if any applications were submitted after that date they were null and void. (2) A balance on hand of $78,251.90 in the nonresident high school tuition fund on August 29, 1969, had not been deducted in determining the amount required to be raised by the levy and that the failure of the Board to make the reduction was contrary to the provision of section 79-4,104, R. R. S. 1943, as follows: "If a balance remains in the fund after all claims have been paid, it shall not revert to the county general fund but shall remain in the nonresident high school fund and be deducted from the amount levied for the succeeding year." (3) The tuition rates submitted by the school superintendent of the receiving high school districts are in excess of the actual per pupil cost and in violation of the limitations claimed to be imposed by section 79-4,102, R. S. Supp., 1969, which provides in part: "The high school tuition rate for nonresident pupils shall be determined annually by the receiving district on a uniform basis for all pupils but such rate shall in no event be less than the average per pupil cost for the preceding school year determined as provided in subsection (3) of section 79-486."

The trial court incorporated in its decree detailed computations of per pupil cost for each of the seven receiving high school districts and computed a total money requirement for the nonresident high school tuition fund for the year 1969-70 in the amount of $136,372.44. From this the court subtracted the $78,251.90 balance in the fund as of August 29, 1969, and computed the sum of $58,128.54 as the amount needed to be raised by the

levy. In determining per pupil cost, it first divided the estimated income from nonresident high school tuition as shown by the 1969-70 budgets of each of the high school districts by $1,000 (presumably the certified tuition rate), and thus arrived at the number of pupils to be received by each district. However, the record in this case is completely devoid of any evidence to establish: (1) The tuition rate certified by each district; (2) the number of nonresident pupils anticipated by each district; and (3) the total number of pupils certified by the county superintendent to the Board.

In the computation of per pupil cost under section 79-486, R. S. Supp., 1969, the court made adjustments eliminating from the costs of various high school districts the amounts received by each as State Aid and Federal Title I funds. It made this adjustment by using the anticipated amount of such aid as shown in the budgets of each of the school districts, then allocating a portion of this to high school education, and then subtracting this allocated figure from high school education costs. The record is devoid of any basis for this allocation except the relationship of the elementary and secondary education costs of each school as shown in the annual financial reports of the districts for the preceding year as they are on file in the offices of the Department of Education. The plaintiff argues that expenditures of the high school districts paid by state aid and federal funds are not part of the costs of the districts because the plaintiff and others similarly situated "pay money to the Federal Government through income taxes. The same taxpayers contribute to the State General Fund by paying state sales, use, and income taxes. When distributions to the individual high school districts are thereafter made by the United States Government, and by the State of Nebraska from the General Fund, the same taxpayers are entitled to receive the benefits of their taxing burden."

A clear understanding of the statutory plan and pur-

poses of the nonresident high school education statutes contained in sections 79-494 to 79-4,106, R. R. S. 1943, including section 79-4,102, R. S. Supp., 1969, which we will hereafter refer to as the act, is necessary to a determination of some of the issues presented.

Section 79-494, R. R. S. 1943, declares that, subject to the conditions of the act, its purpose is to secure 4 years of high school education for those children whose parents or guardians reside in a high school district which does not have a high school.

Section 79-4,100, R. R. S. 1943, is important. It grants to any high school district the right to refuse admission to any and all nonresident students if the tuition fixed by section 79-4,102, R. S. Supp., 1969, is noncompensatory, or if the pupils are from districts not served at the time of the enactment of the statute or previously; "Provided, that no public high school district may refuse admission to nonresident pupils effective prior to the beginning of the 1963-1964 school year, and effective then, or at the beginning of any school year thereafter, only if notice of its intention to refuse admission to nonresident pupils has been given . . . by October 1 of the preceding year . . . by publication in a legal newspaper . . .; and provided further, that any school district may by public notification prior to October 1 require that the parents or guardians of all nonresident pupils must make application on or before April 1 for admission to the following school term." Previous to the 1963 amendment this section of the statute simply read: "Any public high school district may refuse admission to any or all nonresident pupils."

The effect of the 1963 amendment is that the receiving school district must, if it has not brought itself within the proviso by giving the requisite notice, accept all qualified students who make application prior to the beginning of the school year. There is nothing in the record to show whether or not the receiving districts gave the notices mentioned. It therefore may be that

they are in fact required to accept students making application after July 1 and before the beginning of the school year. A student residing with his parent or guardian who moves into a nonhigh school district after July 1 would, in the light of the clearly expressed legislative purpose, certainly be entitled to the benefit of the act.

Section 79-4,102, as amended by the 1969 Legislature, requires the county superintendent of each county in which there is no county high school, within 30 days of the annual meeting—in nonhigh school districts the annual meeting is held the second Monday in June—to "certify to the county board of supervisors or commissioners the number of qualified pupils whose parents or guardians have applied to the county superintendent for nonresident high school tuition privileges and a list of the school districts which have been approved . . . as schools qualified to grant nonresident public high school education . . .." It is apparent that the purpose of this section is to give the county board of equalization a basis for determining the levy.

Sections 79-4,103 and 79-4,104, R. R. S. 1943, make provisions for payment of tuition to the receiving districts and provide that if funds are insufficient, pro rata payments are to be made. The secretary of the high school district may certify both semesters together if for some reason he fails to certify for the first semester. Section 79-4,104, R. R. S. 1943, provides also for paying with the second semester payment any deficiency in the first semester payment, making up any deficiency for the year by levy in the following year, and, as already noted, if there is a balance of funds on hand it is to be deductible from the levy the following year.

Section 79-4,105, R. R. S. 1943, states: "The parent or guardian of any pupil desiring to take advantage of the provisions of sections 79-494 to 79-4,106 for nonresident high school education shall make application, in writing, to the county superintendent of the proper county

before July 1 each year. Such application must show . . .": (1) The number of the district of the legal residence of the parent or guardian; (2) the number of pupils for whom the privilege is desired; and (3) the high school grade the pupil will enter. It is to be noted that no requirement is made in the statute that notification be given of the identity of the high school district which the student will attend. The Legislature has left this to the option of the student and his parent or guardian.

A careful reading of the statutes above cited clearly shows: (1) All qualified students of districts not having a high school are entitled to nonresident high school privileges subject to the conditions of the act. (2) The receiving high school district makes the determination of the per pupil cost in accordance with the statutory standards and these costs may differ from district to district. See Mann v. Wayne County Board of Equalization, *supra,* p. 758. (3) The student may attend the receiving district of his choice. (4) The receiving district is required to accept any qualified student who applies before the beginning of the school year if it has not brought itself within the proviso of section 79-4,100, R. R. S. 1943, by giving the requisite notice. (5) The county board of equalization, in order to make the requisite levy, has the following information: The tuition rate determined by each of the high school districts and the total number of students who, at the time of the certification, have indicated their intention to avail themselves of the privilege. It is apparent that since the county board of equalization does not necessarily know how many students will come under each rate, there can be no way in which it can determine the precise total amount which will be required by the fund. Because of the fact that under the statutes the high school must receive any qualified student who applies before the term begins, it is evident that neither can the county board of equalization know precisely the total number

of students to be served. The county board of equalization must necessarily deal in approximations just as must the school district in determining its budget requests.

The judgment of the trial court to the effect that the total amount of tax money required is precisely the sum of the products of the number of students who attend each high school district as determined by the July 1 applications, multiplied by the per pupil costs for each district, is not supported by the statutory plan. The Legislature has not required that the information be furnished from which such an exact sum can be determined.

The foundation of the computation of the trial court of per pupil cost and the total money requirements of the nonresident high school tuition fund was its preliminary determination of the number of nonresident pupils who would be in attendance at each receiving high school district. This in turn depended upon an assumed cost certified by each district. Neither of these items appear in the record in this case. The plaintiff has the burden of proving that the school levy was in fact excessive. C.R.T. Corp. v. Board of Equalization, 172 Neb. 540, 110 N. W. 2d 194.

Section 79-4,104, as already noted, provides that if a balance remains in the fund after all claims are paid, this balance remains in the fund and must be considered by the county board of equalization in determining the levy for the succeeding year. The trial court determined that for 1969-70 the amount of $136,372.44 was the total fund need and that a balance of $78,251.90 should be deducted, leaving $58,128.54 to be raised by further taxation. The record shows the following past balances: July 1, 1969, $60,889.19; August 1, 1969, $69,147.45; and September 1, 1969, $78,251.90. The record does not show whether or not all claims against the fund were paid at the date that the levy was made. We cannot assume they were even though under the statu-

tory provisions the last payment should be made on or before July 1. Moreover, there is no evidence in the record to show which balance, if any, the Board took into consideration in making the levy. The record shows only the levy of 6.26 mills, but discloses no evidence whatever as to how it was determined or what amount of money it will raise. The amended judgment of the trial court indicates the amount for which levy was made by the Board was $164,110.81, but there is no evidentiary support for the item. It can be reached by subtracting the $60,889.19 balance from the $225,000 alleged to have been used by the Board, but there is no evidentiary support for the $225,000 figure.

We hold: (1) There is a complete failure of proof to support the determinations of the trial court. (2) The Board was required to follow the statutory mandate of deducting any balance in the fund after all claims for the preceding year have been paid, but there is no evidence from which it can be determined in this case that the statutory mandate was not followed. (3) The Board ordinarily has no authority to question those matters properly lying within the discretionary legislative powers of the school district, nor to determine, as a quasi-judicial body, the legality or illegality of the budget requirements made by a political subdivision to whom the Legislature has entrusted the legislative power. State ex rel. City of Omaha v. Lynch, 181 Neb. 810, 151 N. W. 2d 278. We can find in the nonresident high school tuition act no indication of an intention on the part of the Legislature to give the Board supervisory powers over the budget requirements of the school districts.

The correctness of the finding of the trial court that state and federal aid to the high school districts must be deducted in determining per pupil cost should be decided. This same issue was made in Mann v. Wayne County Board of Equalization, *supra*, but not decided on the grounds that the evidence did not show whether or not such items had been credited in determining per

pupil cost. There is no evidence here that the plaintiff and others in her situation have, or if they have to what extent, paid these federal and state taxes, but for purposes of this opinion we will assume plaintiff did.

Once a taxpayer has paid a valid tax he has no further interest in the proceeds save and except the same interest as every other taxpayer, namely, to see that the proceeds are used for the purpose for which they were levied. Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 290, 102 N. W. 2d 599; City of Fremont v. Dodge County, 130 Neb. 856, 266 N .W. 771. Once the tax was levied and collected by the state and federal governments and paid to the high school districts pursuant to the provisions of valid state and federal statutes, the plaintiff had no interest therein such as gave her any standing to claim any special credit therefor. The funds paid to the high school districts became the property of the districts the same as any other taxes lawfully received by them. The Legislature could provide that such amounts not be computed in determining the per pupil cost. It presumably is aware of the existence of the statutes providing state and federal aid. Yet it has made no provision for deducting state and federal aid in computing per pupil cost under section 79-486, R. S. Supp., 1969. Funds received and expended by the high school districts from state and federal aid are, until the Legislature otherwise decrees, part of the per pupil cost.

We do not decide whether an appeal under section 77-1606, R. R. S. 1943, may be taken as a class action.

We next note the Board's assignment of error of absence of necessary parties, viz, the receiving high school districts. These districts must obtain payment of their tuition charges from the fund. If it is insufficient they cannot be paid in full but only pro rata. The rights of these districts are therefore affected for a determination has been made by the trial court that the per pupil costs, which were presumably certified to the county

superintendent, are excessive and to that extent illegal. They could never regain these funds for the judgment of the court, if final and binding, would preclude it. No deficiency would exist for which levy could be made the following year as the statute earlier cited contemplates in the case of a lawful deficiency. We hold that the absent high school districts are necessary parties. § 25-323, R. R. S. 1943; Local Union v. Western Public Service Co., 140 Neb. 186, 299 N. W. 531; Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630; Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533; Stevens v. Loomis, 334 F. 2d 775.

In the cases which have previously been before this court in similar matters, including those inaugurated under sections 77-1601 and 77-1606 to 77-1610, R. R. S. 1943, the affected school districts or other municipal subdivisions have been joined as parties. See, State ex rel. City of Omaha v. Lynch, *supra*; C.R.T. Corp. v. Board of Equalization, *supra;* Mann v. Wayne County Board of Equalization, *supra.*

It may possibly be urged that if necessary parties are absent, then it is not logical for this court to decide the case on the merits and that it should therefore only reverse and remand with directions to bring in the necessary parties. Such course under the circumstances here would only multiply litigation. We point out that the reversal and dismissal of the plaintiff's petition does not adversely affect the rights of the absent parties. It merely restores the situation to what it was prior to the commencement of this action. On the other hand, the plaintiff has had her day in court and as to her there has been due process.

REVERSED AND DISMISSED.

CINDY HULL, BY AND THROUGH DAVID HULL, HER NEXT FRIEND, ET AL., APPELLEES, V. ALLSTATE INSURANCE COMPANY, A CORPORATION, APPELLEE, IMPLEADED WITH FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.

187 N. W. 2d 650

Filed June 11, 1971. No. 37822.

Automobiles: Insurance. Where initial permission to use an insured vehicle has been given by one having proper authority to give permission, to the person operating it at the time of an accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

William B. Craig, for appellant.

Sidner, Svoboda & Schilke, for appellee Hull.

Frederick B. Allan, Jr., and D. Nick Caporale of Schmid, Ford, Snow & Mooney, for appellee Allstate Ins. Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a declaratory judgment action against two insurance companies to determine which one is liable to an individual who holds a judgment for injuries received in an automobile accident. The sole issue is whether or not there is liability under the omnibus clause of a standard automobile liability insurance policy, when initial permission to use the vehicle was given, but restricted as to use, and the restrictions were violated. The district court determined that there was coverage under the omnibus clause and entered judgment accordingly.

On April 14, 1968, Maynard Mulvey was an em-

ployee of Farmers Union Cooperative Oil Association working out of its fertilizer and bulk plant at Cedar Bluffs, Nebraska. There was a heavy rain that afternoon and work was stopped between 5 and 6 p.m. The manager of the co-op gave Mulvey permission to use the pickup truck to go home and to come back to work in the morning. The manager testified that he had allowed other employees to take vehicles home at night when the weather was bad, but that he had not allowed them to use the vehicles for personal use, and that had been explained to Mulvey. The manager testified that the permission was limited to driving the vehicle to Mulvey's home and returning from home the next morning. Mulvey lived two and a half blocks from the plant. Sometime between 9 p.m. and midnight, Mulvey was involved in the accident out of which the claim and judgment arose. It was stipulated that Mulvey was not within the scope of his employment at the time of the accident.

Farmers Elevator Mutual Insurance Company carried standard automobile liability coverage on the pickup truck owned by the co-op and driven by Mulvey. Allstate Insurance Company insured the other vehicle involved in the accident, and uninsured motorist coverage was included. The plaintiff recovered judgment against Maynard Mulvey for $2,348. The district court found that Maynard Mulvey was an additional insured under the omnibus clause in the standard policy of the Farmers Elevator Mutual Insurance Company; granted judgment against that defendant; and dismissed the action against Allstate Insurance Company.

The appellant tacitly concedes that this court has adopted the initial permission doctrine in Arndt v. Davis, 183 Neb. 726, 163 N. W. 2d 886. The appellant contends, however, that there is some language in that opinion which might indicate that a violation of express instructions, or a violation of specific orders, makes the use of

the vehicle unauthorized and terminates the permission. We cannot agree.

The holding in the Arndt case was foreshadowed by Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179. That case recognized the fact that the protection of the public is also involved in automobile liability insurance cases. In view of statutory omnibus clause language, we there held that where initial permission had been given, a later use which deviated from the permitted use was immaterial and the only essential was that permission be given for use in the first instance. See, also, Farm Bureau Ins. Co. v. Allied Mut. Ins. Co., 180 Neb. 555, 143 N. W. 2d 923.

The position of this court on the initial permission doctrine reflects the view that automobile liability insurance is for the benefit of the public as well as insureds. Litigation as to the scope of the permission, the purpose, time, or place of use, and similar issues should not be permitted or encouraged. Of the various doctrines dealing with the issues of permission, this court's interpretation has probably been closest to the "hell or high water" rule. That rule has been stated to be "that if the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated." 7 Appleman, Insurance Law and Practice, § 4366, p. 308.

In the case before us, there is no dispute that Mulvey had initial permission to use the vehicle. The only dispute is whether that permission should be strictly limited to the exact scope of the use expressly authorized. We find no compelling reasons to constrict our interpretation so rigidly. Where initial permission to use an insured vehicle has been given by one having proper authority to give permission, to the person operating it at

the time of an accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated. Where a named insured has given permission to another to operate an insured vehicle, liability insurance coverage ought not to depend on whether the operator is complying with or violating the conditions or terms placed upon his operation and use of the vehicle by the insured.

The judgment is affirmed.

AFFIRMED.

MARCUS CHERRY, APPELLANT, V. MARVIN A. LOFGREN, BUFFALO COUNTY SUPERINTENDENT OF SCHOOLS, ET AL., APPELLEES.

187 N. W. 2d 652

Filed June 11, 1971. No. 37829.

1. **Appeal and Error: Schools and School Districts.** Where a defeated party undertakes to perfect an appeal from an adverse ruling of the county superintendent of schools and orders a transcript in accordance with section 27-1303, R. R. S. 1943, and the transcript is incomplete or deficient in form, all other requirements having been met, the failure to furnish a proper transcript will not defeat the appeal.
2. **Appeal and Error: Schools and School Districts: Case Overruled.** Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, is overruled.
3. **Appeal and Error: Schools and School Districts.** A duly authenticated transcript of the proceeding to be reviewed must be filed in the district court, but if the required transcript furnished and filed is deficient in form through no fault of the appellant, it should not defeat his right to an appeal.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Ross & Schroeder, for appellant.

Munro, Parker, Munro & Grossart, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Marcus Cherry appeals from the dismissal of his petition on appeal in the district court. The district court's action is predicated on its determination that a proper transcript of the proceedings before the county superintendent was not filed with the petition on appeal. We reverse.

Appellant filed an adequate praecipe with the appellee county superintendent, requesting a transcript of the proceedings. It included the following: "The transcript of the proceedings should include, but not be limited to, duly authenticated copies of the original papers, pleadings and the final order of the Buffalo County Superintendent of Schools. Petitioner also requests that the transcript incorporate this praecipe here, the notice of appeal and the cost bond on appeal."

The county superintendent furnished the appellee a purported transcript to which the following certificate was attached: "I, Marvin Lofgren, County Superintendent of Schools of Buffalo County, Nebraska; having possession and custody of Buffalo County School District #101 files; hereby certify that this is a true and correct copy of the originals on file in the office of the Buffalo County Superintendent. /s/ Marvin Lofgren."

Plaintiff's petition on appeal and the alleged transcript were filed within the time allowed for appeal. One of the defendants filed a motion to dismiss, alleging among other grounds that a duly authenticated transcript of the proceedings from which appellant is purportedly appealing has not been filed and docketed in the district court as required by sections 27-1303 and 27-1304, R. R. S. 1943. The district court sustained the motion and entered the following order: "Now on this 1st day of September, 1970, this matter came on for decision of the Court. The Court finds that under the cases of Ne-

braska, he is obligated to dismiss the appeal for the reason that proper transcript of proceedings was not filed.

"In making this decision, the Court finds that this is one of those cases where the burden of filing the transcript is upon the appellant and the appellants therefore would have the duty to see that the transcript prepared by the County Superintendent was in correct form.

"This appeal is therefore dismissed."

Appellant on the hearing on his motion for a new trial offered an affidavit of the county superintendent, which so far as material herein, provides: "STATE OF NEBRASKA, COUNTY OF BUFFALO) ss

"I Marvin A. Lofgren, Buffalo County Superintendent of Schools, first being duly sworn deposes and says:

"That the transcript on file with the District Court of Buffalo County, Nebraska, contains duly authenticated copies of all proceedings containing the judgment and final order by the County Superintendent with regard to the petition filed to dissolve School District No. 101 in Buffalo County, Nebraska."

The trial court in dismissing the appeal relied on Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, which places the responsibility for filing a proper transcript directly on the plaintiff in error. In that case, which was an error proceeding, the basic question involved was whether or not a purported transcript not certified to or authenticated by the county superintendent of schools of Howard County vested jurisdiction in the district court. We held that it did not; that it was mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with the subject matter in an error proceeding. This had been the rule in error proceedings.

Previous to 1963, reviews in cases arising under section 79-402, R. S. Supp., 1961, were processed by error proceedings. This section was amended by the 1963

Legislature to provide that any person adversely affected by the changes made by the county superintendent could appeal to the district court. The obvious legislative intent was to simplify the review procedure by providing for appeal.

In School District of Wilbur v. Pracheil, 180 Neb. 121, 141 N. W. 2d 768, we said: "The Judicial Council also suggested Legislative Bill 277 (Laws 1963, c. 138, p. 515) to the 1963 Legislature to provide the procedure for appeal where the statute confers a right to appeal but fails to prescribe the procedure. L.B. 277, which is now section 25-1937, R. R. S. 1943, prescribes not only the manner of taking an appeal to the district court but also provides how the appeal shall be considered."

Subsequently, in Languis v. DeBoer, 181 Neb. 32, 146 N. W. 2d 750, we held: "Any person adversely affected by the changes made by the county superintendent pursuant to section 79-402, R. S. Supp., 1965, may proceed either by appeal or by error pursuant to section 25-1903, R. R. S. 1943."

The instant case is controlled not by Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, as determined by the district court, but rather by Liljehorn v. Fyfe, 178 Neb. 532, 134 N. W. 2d 230. In Liljehorn we held that where the law makes it the mandatory duty of a public officer when requested to do so to provide a certified transcript of the proceedings for the appellant upon the payment of the costs, his failure or neglect to do so will not deprive the appellant of his right to appeal. The appellant herein complied with the law to perfect an appeal and his failure to secure a properly authenticated transcript is not his fault but that of the county superintendent.

We do not agree with the trial court that the appellant has the duty to see that the transcript prepared by the county superintendent is in proper form. It is the duty of the county superintendent to furnish appellant a properly certified transcript. The appellant in ordering a tran-

script is justified in relying upon the presumption that it will be properly prepared and available for him within the proper period for filing according to law. In re Estate of House, 144 Neb. 870, 15 N. W. 2d 56, dealt with a situation where an appellant was given an unsigned transcript by the county judge and filed it within the proper period. In holding that the failure of proper certification could not be charged to the appellant, the court said: "The oversight of the county judge in failing to attach his signature to the certification of the transcript cannot therefore be charged to the appellant and he cannot be deprived of his right to be heard on appeal because of the omission on the part of the county judge."

We here hold that where a defeated party undertakes to perfect an appeal from an adverse ruling of the county superintendent of schools and orders a transcript in accordance with section 27-1303, R. R. S. 1943, and the transcript is incomplete or deficient in form, all other requirements having been met, the failure to furnish a proper transcript will not defeat the appeal.

The application of different rules in error proceedings and appeals is very conducive to misunderstanding and confusion. While we dislike to change a rule so recently reexamined, in retrospect we believe the application of different rules to the filing of authenticated transcripts in appeal and error proceedings is drawing a distinction where none really exists. In all procedures where a public officer is required to furnish an authenticated transcript to the party appealing upon the payment of his costs, the rule should be exactly the same. We now overrule Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, and the cases on which it is predicated, so far as they are in conflict with the rule enunciated herein.

A duly authenticated transcript of the proceeding to be reviewed must be filed in the district court, but if the required transcript furnished and filed is deficient

in form through no fault of the appellant, it should not defeat his right to an appeal.

The proper procedure in instances of this kind is for the appellant to file a request for a diminution of the record and for the district court by proper order to compel the inferior court or tribunal to make or amend the transcript according to law, whether by correcting an evident mistake or supplying an evident omission. In the instant case we observe that the alleged transcript filed herein not only had a deficient certificate but although the affidavit filed by the county superintendent indicates otherwise, there is no judgment or final order by the county superintendent included in it.

For the reasons indicated, the judgment herein is reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN RE FREEHOLDER'S PETITION OF ELIZABETH L. BADER. ELIZABETH L. BADER, APPELLEE, V. DONALD D. HODWALKER ET AL., APPELLANTS.
187 N. W. 2d 645

Filed June 11, 1971. No. 37833.

1. **Pleadings: Appeal and Error.** While a petition may be attacked at any stage of the proceedings on the grounds of its insufficiency to state a cause of action, where the attack is delayed until appeal the pleading will be liberally construed.
2. **Pleadings: Schools and School Districts.** Transfer from a nonaccredited school district to an accredited one states a sufficient reason for transfer.

Appeal from the district court for Merrick County: C. THOMAS WHITE, Judge. Affirmed.

John E. Dougherty, for appellants.

Sampson & Armatys and Perry, Perry & Witthoff, for appellee.

Robert G. Simmons, Jr., for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This appeal by Donald D. Hodwalker and School District No. 9 is from the order of the district court transferring land owned by the appellee Elizabeth L. Bader from School District No. 9 of Merrick County, Nebraska, a Class I school district, and from Grand Island Northwestern School District, a Class IV school district, to School District No. 4 (Central City School District) of Merrick County, Nebraska, an accredited Class III school district. The joint boards of Hall and Merrick counties, consisting of their county superintendents, county clerks, and county treasurers, ordered the transfer. We affirm.

The only issue involved in this appeal is the sufficiency of the petition for transfer to state facts sufficient to confer jurisdiction to make the transfer. The appeal is premised upon the allegation that the petition, as required by section 79-403, R. R. S. 1943, does not state or give any reasons why the land should be transferred from School District No. 9 to School District No. 4. Appellants concede that in all other respects the petition is in proper form.

The issue on the sufficiency of the pleadings was raised by appellants for the first time in their motion for judgment notwithstanding journal entry and motion for new trial. While a petition may be attacked at any stage of the proceedings on the grounds of its insufficiency to state a cause of action, where the attack is delayed until appeal, the pleading will be liberally construed. Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. We apply that rule herein.

The translocation order herein was dated August 29, 1969. Section 79-403, R. R. S. 1943, was amended during the 1969 legislative session. Legislative Bill 1378 amending said section was passed with the emergency clause,

and became effective August 4, 1969. (Laws 1969, c. 710, p. 2727.) These proceedings, which were initiated August 12, 1969, are controlled by the statute as amended by L.B. 1378. The amended statute, so far as material herein, provides: "Any freeholder or freeholders, person in possession or constructive possession as vendee pursuant to a contract of sale of the fee, holder of a school land lease under section 72-232, or entrant upon government land who has not yet received a patent therefor may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any *tract* of land described therein set off from *any Class I, II or VI school district prior to January 1, 1970, or any time from a nonaccredited Class I, II, III or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto.* The petition shall state the reasons for the proposed change and *shall* show *with reference to the land of each petitioner:* (a) That the land therein described is either owned by the petitioner or petitioners or that he or they hold a school land lease under section 72-232, are in possession or constructive possession as vendee under a contract of sale of the fee simple interest, or have made an entry on government land but have not yet received a patent therefor; (b) that the *land* proposed to be attached has children of school age *who have resided* thereon with their parents or guardians *for not less than forty days prior to filing the petition;* (c) that the land described therein is located in a *Class I, II, III or VI* school district *as provided in this subsection (2),* and is to be attached to an accredited school district *in the county of the residence of the petitioner or an adjoining county thereto;* and (d) that such petition is approved by a majority of the members of the school board or board of education of the district to which such land *is sought to* be attached." (Italics supplied.)

The portion of the above act placed in italics was

added to the statute and established a separate reason to justify transfer of land from one school district to another. Transfer from a nonaccredited school district to an accredited one states a sufficient reason for transfer. The petition filed by the appellee herein stated that the property is in a Class I and Class IV school district and is to be attached to an accredited school district in the county of residence of the petitioner. It therefore states a sufficient reason for the transfer, pursuant to L.B. 1378. Accreditation is becoming increasingly important. A school district which provides education for its children from the kindergarten through high school in accredited schools provides substantial educational advantages over a school district which provides for only part of the education of its children, and all or much of it in nonaccredited schools.

Judgment affirmed.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF LELAND J. GREVING ET AL. LELAND J. GREVING ET AL., APPELLEES, V. DONALD D. HODWALKER ET AL., APPELLANTS.

IN RE FREEHOLDER'S PETITION OF ROBERT MANNING ET AL. ROBERT MANNING ET AL., APPELLEES, V. DONALD D. HODWALKER ET AL., APPELLANTS.

IN RE FREEHOLDER'S PETITION OF ROBERT E. HUSMANN. ROBERT E. HUSMANN, APPELLEE, V. DONALD D. HODWALKER ET AL., APPELLANTS.

187 N. W. 2d 647

Filed June 11, 1971. Nos. 37834, 37835, 37836.

Appeals from the district court for Merrick County: C. THOMAS WHITE, Judge. Affirmed.

John E. Dougherty, for appellants.

Sampson & Armatys and Perry, Perry & Witthoff, for appellees.

Robert G. Simmons, Jr., for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

These appeals, while separately tried, were briefed and argued with Bader v. Hodwalker, 187 Neb. 138, 187 N. W. 2d 645. They involved exactly the same issue presented therein. Our holding in that case is therefore determinative of these appeals. We affirm the respective judgments herein.

AFFIRMED.

LEE POTTS, APPELLEE, V. ROBERT MAHOOD, APPELLANT, IMPLEADED WITH ELIZABETH JOHNSON, APPELLEE.
187 N. W. 2d 655

Filed June 11, 1971. No. 37844.

Statutes: Attorneys at Law: Fees. Under section 25-1801, R. S. Supp., 1969, when the judgment is over $50, the attorney fees are fixed at the sum of $10 plus 10 percent of the judgment in excess of $50.

Appeal from the district court for Antelope County: GEORGE W. DITTRICK, Judge. Affirmed as modified.

McFadden & Kirby, for appellant.

Elmer C. Rakow, for appellee Potts.

Thomas E. Brogan, for appellee Johnson.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action for damages to crops caused by defendant's livestock. The jury returned verdicts for the plaintiff and against the defendant on three causes of action which arose in 1964 and 1966. The verdicts

were for $78.50, $76.80, and $51.20. The jury also returned a verdict in favor of a third party complainant in the sum of $120. The district court entered judgments against the defendant in those respective amounts and later fixed the attorney fees of the successful parties at one-half of the amounts of the respective judgments. The allowance and amount of attorney fees is the only issue on appeal.

Section 25-1801, R. R. S. 1943, provided for the allowance of attorney fees in certain cases. The relevant portion of that section prior to 1967 provided: "Attorney fees, as provided by this section, shall be assessed by the court in a reasonable amount but shall in no event be less than ten dollars, when the judgment is fifty dollars or less, and when the judgment is over fifty dollars up to *one* thousand dollars the *minimum* attorney fee shall be ten dollars plus ten per cent of the judgment in excess of fifty dollars." (Emphasis ours.)

In 1967, the maximum amount of a claim subject to the statute was changed from $1,000 to $2,000 and that change was also reflected in the portion of the statute dealing with attorney fees. In addition, an individual floor amendment deleted the single word "minimum" from the portion of the statute dealing with attorney fees when the judgment is over $50.

The floor debate on L.B. 676 of the 1967 Legislature sheds little light on the understanding or intention of the Legislature when it deleted the word "minimum." There is no explanation as to why the Legislature wished to have attorney fees determined differently simply because the judgment was more or less than $50. Nevertheless, the only reasonable interpretation of the statute as amended is that when the judgment is over $50, the attorney fees are fixed at the sum of $10 plus 10 percent of the judgment in excess of $50. Although the fees allowed here were clearly reasonable, the judgments involved were over $50 in each instance.

The order of the district court dated January 24, 1969,

for determination and allowance of attorney fees should have allowed fees against the defendant on plaintiff's first cause of action at $12.85; second cause of action, $12.68; and fifth cause of action, $10.12. The attorney fee on the third party defendant's first cause of action should have been $17.

The order allowing attorney fees is affirmed as modified as to each of the respective judgments.

AFFIRMED AS MODIFIED.

ENOCH ROBINSON, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
187 N. W. 2d 756

Filed June 11, 1971. No. 37845.

1. **Criminal Law: Indians: Jurisdiction.** When appellant committed the offense of murder, the State of Nebraska was exercising exclusive jurisdiction over criminal acts in Indian territory in Nebraska.
2. **Statutes: Indians: United States: States.** The Act of Congress, approved August 7, 1882, 22 U. S. Stat. at Large 341, granted the State of Nebraska both civil and criminal jurisdiction of the Indians in Nebraska.
3. **Treaties: Indians: United States: Powers.** The power of Congress over Indian affairs is plenary and cannot be limited by treaty.
4. **Statutes: Indians: United States: Powers: Jurisdiction.** The inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field, and therefore the federal government may withdraw from the field and turn jurisdiction back to the states when it chooses to do so.
5. **States: Indians: United States: Statutes: Jurisdiction.** No acceptance of Public Law 280 was required of the State of Nebraska. By its terms it applied to Nebraska, and only the states not specifically mentioned were required to accept its provisions if they wanted to avail themselves of it.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Lawrence E. Murphy, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Enoch Robinson, an Omaha Indian who is now serving a life sentence in the Nebraska Penal Complex for murder, appeals from the dismissal of his application for a writ of habeas corpus. The application attacks the jurisdiction of the State to prosecute an Omaha Indian for the murder of another Omaha Indian on the Omaha Indian Reservation in Thurston County, Nebraska. We affirm.

On January 13, 1969, appellant murdered an Omaha Indian in the village of Macy, Thurston County, Nebraska. This court affirmed appellant's conviction for that offense on January 9, 1970. State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443. This was more than 9 months before the Secretary of the Interior published an Order on October 24, 1970, purporting to accept retrocession of jurisdiction of offenses committed by or against Indians within the boundaries of the Omaha Indian Reservation in Thurston County, Nebraska. Appellant's claims are predicated on his theory that the State of Nebraska did not have jurisdiction of his person or of the particular offense involved.

Appellant's first contention, relying on United States v. Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886), is that the murder of an Omaha Indian by another Omaha Indian within the limits of the Omaha Indian Reservation is a federal offense, exclusively cognizable in the courts of the United States. Without reference as to whether concurrent jurisdiction may have existed prior to the passage in 1953 of Public Law 280, 18 U.S.C.A., section 1162, there is no question that

act withdrew federal jurisdiction over offenses committed in Indian conutry. It specifically granted the State of Nebraska exclusive criminal jurisdiction over Indian country to the same extent such jurisdiction applied elsewhere in the state. When appellant's offense was committed only the State of Nebraska was exercising jurisdiction over criminal acts in Indian territory in Nebraska.

Appellant places some reliance on the old Nebraska case of Ex Parte Cross, 20 Neb. 417, 30 N. W. 428, as a controlling case herein. That case was mere dictum, and obviously no authority for the present question. It is to be noted that the court there did not consider the Act of Congress approved August 7, 1882, 22 U. S. Stat. at Large 341, in which the Secretary of the Interior was authorized by and with the consent of the Omaha Tribe of Indians in open council to convey a portion of the land of the Omaha Indians as therein provided, and to distribute the remaining lands to the individual members of the tribe and certain portions to be held in trust for the tribe as common property.

Section 7 of the Act of 1882 specifically provided: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, *both civil and criminal*, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law." (Italics supplied.) The foregoing statute has never been repealed and applies specifically to Omaha Indians and the Omaha Indian Reservation.

With reference to the claim of appellant that United States v. Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886), abrogated the effect of this act, we call attention to Hallowell v. United States, 221 U. S. 317, 31 S. Ct. 587, 55 L. Ed. 750, a 1910 case which is premised on the effectiveness of the Act of 1882, and recognized

section 7 of the act as granting civil and criminal jurisdiction to the State of Nebraska over the Omaha Indian Reservation.

Appellant argues that a treaty of March 16, 1854, between the Omaha Tribe of Indians and the United States is controlling herein, and that it cannot be arbitrarily abrogated by Congressional action. It has been consistently held that the power of Congress over Indian affairs is plenary, that it cannot be limited by treaty, and that an Indian treaty may be abrogated by Congress so long as individual rights acquired under the treaty are not destroyed. Lone Wolf v. Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. Ed. 299. In any event, the Act of 1882 modified the original treaty.

Appellant then argues that Public Law 280, 18 U.S.C.A., section 1162, is unconstitutional as applied to the Omaha Indians. He contends that the act conflicts with three different substantive due process prohibitions: (1) The prohibition against arbitrary legislation; (2) the prohibition against unequal application of a law or unreasonable classification within a law; and (3) the prohibition against vagueness in Congressional legislation. There is no merit to any of these points.

Public Law 280 applied specifically to five states including Nebraska, and excepted certain reservations in three of those states other than Nebraska. However, it also contained a provision giving all other states the right to acquire similar jurisdiction if they so desired. There were reasons which are immaterial for our present discussion why the five states, including Nebraska, were specifically listed. The Indian groups within the five states for the most part were agreeable to the transfer of jurisdiction. The groups opposing such transfer, which had a tribal law and order organization functioning in a reasonably satisfactory manner, at their request were omitted from the transfer.

The United States Constitution contains no direct grant of power to the federal government over criminal

offenses by Indians in Indian country. As stated above, Congress has plenary power over Indian affairs as well as the power to abrogate treaty rights. Consequently, it had the power to grant exclusive criminal jurisdiction to the states, and particularly so when this was done with the concurrence of the Indian groups involved. The inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field, and therefore the federal government may withdraw from the field and turn jurisdiction back to the states when it chooses to do so. Appellant has the burden to show just how and why Public Law 280 violates the Constitution of the United States. This he has failed to do.

Appellant's argument is adequately answered in Anderson v. Gladden, 293 F. 2d 463, in which the United States Circuit Court of Appeals for the Ninth Circuit said: "We further agree with the state court's holding on the question of the power of Congress to relinquish this jurisdiction in favor of the states. The power over Indians was deemed not so inherently or exculsively federal as to apply beyond the extent to which the federal government has preempted the field, and the federal government could thus withdraw from the field and turn the subject matter back to the states when it chose to do so."

Appellant then argues that even if we were to find Public Law 280 constitutional, Nebraska never accepted the benefit of its provisions. By the legislation, Congress withdrew from the federal court jurisdiction over crimes affecting Indians on Indian Reservations in five specifically mentioned states. No acceptance was required of those states. The State of Nebraska, being one of them, had either concurrent or residual jurisdiction over the crime of which the appellant had been convicted, and full jurisdiction over such crime was returned to the State of Nebraska on passage of Public Law 280.

Lastly, appellant argues that the Indian Civil Rights Act of 1968 nullified any possible state jurisdiction over the offense herein. By this argument, he is raising the question of retrocession which has heretofore been adequately answered by this court in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305. Unlike Goham, appellant's conviction had become final before the Secretary of the Interior attempted to accept retrocession.

For the reasons given, there is no merit to any of appellant's assignments of error. The judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. STEWART W. GREENBURG, APPELLEE.
187 N. W. 2d 751

Filed June 18, 1971. No. 37841.

1. **Constitutional Law: Statutes: Criminal Law.** The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself.
2. ———: ———: ———. The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter.
3. **Constitutional Law: Statutes: Criminal Law: Drugs and Narcotics.** Chapter 197, Laws 1969, declared unconstitutional as in violation of Article III, section 14, Constitution of Nebraska.
4. **Constitutional Law: Statutes: Criminal Law.** Ordinarily, if an amendatory act is invalid, the original statute remains in effect.
5. **Constitutional Law: Statutes: Criminal Law: Drugs and Narcotics.** The reference to section 28-472.03, R. S. Supp., 1969, in section 28-470, R. S. Supp., 1969, is surplusage.

Appeal from the district court for Kimball County: JOHN H. KUNS, Judge. Exceptions sustained.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellant.

Van Steenberg, Meyers & Burke, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant was charged with possession of one-half pound or more of mixtures or substances containing cannabis in violation of section 28-472.03, R. S. Supp., 1969. The trial court sustained a motion to quash the information on the ground that the law was unconstitutional, and ordered the defendant discharged. The State then obtained leave to docket error proceedings under section 29-2315.01, R. R. S. 1943, to review the order of the district court.

Prior to 1969, cannabis was defined as a narcotic drug, and unlawful possession of cannabis was a felony punishable under section 28-470, R. R. S. 1943. In 1969, the Legislature enacted L.B. 2 (Laws 1969, c. 197, p. 793) which related specifically to cannabis and its resin. Unlawful possession of less than a specified amount of cannabis was made a misdemeanor. § 28-472.04, R. S. Supp., 1969. The act further provided that the penalties provided in sections 28-472.03 and 28-472.04 were to be applicable to all violations of the act and all charges pending on April 11, 1969. § 28-472.05, R. S. Supp., 1969.

It is clear that L.B. 2 amended section 28-470, R. R. S. 1943, by implication. It did not comply with Article III, section 14, of the Nebraska Constitution, which provides that "no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

The State contends that the constitutional requirement was not applicable because L.B. 2 was an independent act. It is well established that the constitutional provision is not applicable to an independent act complete in itself. Blair Co. v. American Savings Co., 184 Neb. 557, 169 N. W. 2d 292.

The difficulty with L.B. 2 is that it was not complete

in itself insofar as applicable to the subject matter properly embraced within its title. If it is assumed that the subject matter of L.B. 2 was "marihuana abuse," as suggested by the State, the act cannot properly be considered as complete in itself. Cannabis is still defined as a narcotic drug in subsection (14) of section 28-451 as amended by L.B. 2 (§ 28-451, R. S. Supp., 1969) and is subject to the requirements, restrictions, and exemptions of the Narcotic Drugs Act.

Section 28-472.03, R. S. Supp., 1969, refers to knowing and *unlawful* possession of cannabis. In order to ascertain what is unlawful possession of cannabis, it is necessary to consider the various exemptions contained in the Narcotic Drugs Act. Instead of being an independent act complete in itself, L.B. 2 relates itself to other existing statutes dealing with the same subject matter. As stated in State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256: "In truth, the new enactment accomplished nothing of independent nature and its effect is wholly confined to 'changes' of what theretofore existed, with the evident intent of its authors that by the mingling of the new changes with old provisions a connected piece of legislation covering the same and original subject would result."

The State further contends that L.B. 2 worked a repeal by implication, as distinguished from an amendment, and that repeals by implication are not subject to the constitutional requirement. We think that a proper interpretation to the effect of L.B. 2 upon section 28-470, R. R. S. 1943, is that section 28-470 was amended but not repealed by L.B. 2. Section 28-470, R. R. S. 1943, was amended during the 1969 session by L.B. 1385 (Laws 1969, c. 218, p. 839) which became effective more than 3 months after L.B. 2. Section 28-470, as amended by L.B. 1385, provides in part: "Except as provided in sections 28-472.03 and 28-472.04, * * *." § 28-470, R. S. Supp., 1969. The exception inserted in section 28-470 was a legislative recognition of the amendment of section

28-470 by L.B. 2 but not a repeal of the section.

As stated in Chicago, B. & Q. R.R. Co. v. County of Box Butte, 166 Neb. 603, 90 N. W. 2d 72: "The wisdom of the constitutional provision is not a matter for this court to determine. The constitutional limitation placed upon the Legislature in amending existing statutes must be followed, and where, as here, its terms are not complied with, the act is void and of no force or effect."

The finding of the trial court that L.B. 2, including section 28-472.03, R. S. Supp., 1969, was invalid was correct. The remaining question is whether the information should have been quashed and the defendant discharged. Ordinarily, the invalidity of an amendatory act leaves the original statute in force. See State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N. W. 2d 796.

Section 28-470 as amended by L.B. 1385 (28-470, R. S. Supp., 1969) on its face appears to be inapplicable to any case in which section 28-472.03, R. S. Supp., 1969, is applicable. However, since section 28-472.03, R. S. Supp., 1969, was invalid for any purpose and was as inoperative as though it had never been passed, the reference to section 28-472.03, R. S. Supp., 1969, at the beginning of section 28-470, R. S. Supp., 1969, was surplusage. The result is that the defendant was subject to prosecution under section 28-470, R. S. Supp., 1969, which was in effect on August 20, 1969, the date alleged in the information. The information should not have been quashed and the defendant should not have been discharged.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. ERIC RICHARD SMITH, APPELLANT.

187 N. W. 2d 753

Filed June 18, 1971. No. 37806.

1. **Witnesses: Evidence: Trial. Testimony by an expert witness as to the weight of an exhibit weighed on a laboratory scale was**

admissible without prior evidence as to the accuracy of the scale.

2. **Prosecuting Attorneys: Criminal Law: Trial.** It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty he may be.
3. **Appeal and Error: Criminal Law: Records: Drugs and Narcotics.** A conviction under section 28-472.03, R. S. Supp., 1969, will be affirmed where the record is sufficient to sustain a conviction under section 28-470, R. S. Supp., 1969.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for unlawful possession of one-half pound or more of cannabis. The assignments of error relate to the admissibility of evidence and misconduct of the prosecuting attorney.

There was evidence from which the jury could find that the defendant was observed carrying a sack containing approximately 7 pounds of cannabis from the house at 6611 Franklin Street in Omaha, Nebraska, to the rear of the house at 6607 Franklin Street. About 30 minutes later the defendant was observed removing a part of the contents from the sack which he carried back into the house at 6611 Franklin Street. The defendant testified that the sack had been left in front of the house by a third party and that he had taken it to the rear of the house to place it in a trash container to get rid of it. The defendant denied that he had returned to the sack after placing it in the rear of the house at 6607 Franklin Street. The evidence, although in conflict, was clearly sufficient to sustain the finding of guilty.

William J. Ihm, a chemist employed by the State, was allowed to testify over objection that he had weighed the contents of the sack on a scale in the laboratory and that it weighed 7 pounds 4 ounces. The defendant contends that the foundation for this testimony was inadequate because it was not shown that the scale had been tested and found to be accurate. The contention is without merit.

The defendant obtained leave to cross-examine as to foundation and inquired only as to when the scale had last been licensed. There is no reference to any licensing requirement applicable to laboratory scales, and the defendant made no inquiry as to whether the scale had been tested for accuracy. Another witness had testified previously that he estimated the weight of the sack at around 7 or 8 pounds. The offense was proved if the weight was one-half pound or more. The ruling was within the discretion of the trial court.

The other assignment of error relates to conduct of the county attorney in the trial of the case. The defendant contends that he was prevented from having a fair trial because of the offer of irrelevant evidence and unfair argument to the jury. The items of evidence complained of consisted of questions about the market value of marihuana; a reference to hashish; whether the defendant was the father of a child born out of wedlock who was present in the house at 6611 Franklin Street; and whether the house at 6611 Franklin Street had been under police surveillance. The argument complained of consisted of a statement that the police had not searched the house at 6611 Franklin Street because they were prevented by law from doing so.

Objections by the defendant were sustained to all of the questions except the one relating to hashish and the cross-examination of the defendant as to the market value of marihuana. The answer to the hashish question was conditionally received but there was no subsequent motion to strike. The defendant answered that he

did not know the market value of marihuana, that there were many prices.

The defendant's objection to the argument explaining the failure to search was sustained and the jury was instructed to disregard the comments. As we view the record it does not show that the defendant did not have a fair trial.

It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty he may be. Rules of evidence and conduct are prescribed to insure that the rights of the accused are maintained.

The evidence and the argument complained of in this case had little or no relevance to the issues, but we are satisfied that the defendant received a fair trial. Each case must be determined on its own facts. Where the defendant has been prejudiced, the conviction will be set aside.

The prosecution in this case was under section 28-472.03, R. S. Supp., 1969, which has been declared unconstitutional. State v. Greenburg, *ante* p. 149, 187 N. W. 2d 751. The defendant was subject to prosecution under section 28-470, R. S. Supp., 1969, for unlawful possession of *any amount* of cannabis. By proceeding under section 28-472.03, R. S. Supp., 1969, the State assumed a greater burden than that imposed by section 28-470, R. S. Supp., 1969.

The trial court advised the jury that cannabis was a narcotic drug and that possession of a narcotic drug was unlawful unless otherwise authorized in the act. The information and the evidence are sufficient to sustain a conviction under section 28-470, R. S. Supp., 1969. Thus, the record is sufficient to sustain the conviction under section 28-470, R. S. Supp., 1969.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF AUBREY ALLEN ET AL.
AUBREY ALLEN ET AL., APPELLANTS, V. OMAHA TRANSIT CO., INC., APPELLEE.
187 N. W. 2d 760

Filed June 18, 1971. No. 37991.

1. **Public Service Commissions: Carriers: Powers.** Under Article X, section 7, of the Constitution of Nebraska, and section 75-126, R. S. Supp., 1969, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of fares by common carriers, is vested in the Nebraska State Railway Commission.
2. ———: ———: ———. Section 75-126, R. S. Supp., 1969, delegates to the Nebraska State Railway Commission quasi-judicial power to determine the issue of unjust discrimination in the charging of fares by common carriers under the standards therein set out, and vests the Nebraska State Railway Commission with quasi-judicial power to examine the facts and to determine questions of law.
3. **Public Service Commissions: Powers.** Generally, the Nebraska State Railway Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers.
4. **Public Service Commissions: Trial.** Section 75-110.01, R. S. Supp., 1969, requires the Nebraska State Railway Commission to hold a hearing on an application or petition unless it is not opposed and its disposition is made by the use of affidavits.

Appeal from the Nebraska State Railway Commission. Reversed.

James E. McShane and Howard Kaiman, for appellants.

Robert A. Skochdopole and William T. Oakes of Kennedy, Holland, DeLacy & Svoboda, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The issue in this case is whether the Nebraska State Railway Commission, hereinafter referred to as the Railway Commisison, may summarily deny an application for a reduction of rates without holding a hearing

specifically requested by the applicants senior citizens of Omaha, Nebraska. The Railway Commission denied the application and denied the applicants an opportunity to be heard before the Railway Commission. We reverse the Railway Commission's order for failure to hold a hearing.

The applicants are senior citizens in the City of Omaha, Nebraska, and filed this application before the Railway Commission requesting a special rate for senior citizens over the age of 62 years during specified hours during the week. The proposed fare to be charged was 20 cents per ride with no charge for transfers. It was requested that the rate be instituted for 1 year.

At the outset it should be clearly pointed out that the issue here is not the determination of the merits of such a request or whether such a classification of "senior citizens" over the age of 62 years is a proper one that may or may not be made by the Railway Commission. The specific issue before this court is whether the Railway Commission should have given the applicants an opportunity to be heard. A notice of public hearing on the application was given. Prior to the time of the holding of the hearing according to the notice, and after receiving an opinion from the Attorney General of Nebraska that the Railway Commission was without authority to fix such a classification and to require reduced fares for any special class of passengers, the Railway Commission entered an order on December 7, 1970, dismissing the applicants' application for lack of jurisdiction and subsequently overruled applicants' motion for a hearing according to the terms of the public notice.

At common law, common carriers were required to carry passengers or freight without "unjust" discrimination. Jurisdiction in the Railway Commission to inquire into allegations or complaints about unjust discrimination in the charging of fares by common carriers is founded in the Constitution of Nebraska, Article X, section 7, which states: "The Legislature shall pass

laws to correct abuses and prevent *unjust* discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture, of their property and franchises." (Emphasis supplied.) In accordance with this section, the Legislature delegated this general constitutional power to inquire into discriminatory rates to the Railway Commission. Section 75-126, R. S. Supp., 1969, provides: "(1) Except as otherwise provided in this section, no common carrier shall:

"(a) Charge, demand, collect, or receive from any person a greater or less compensation for any services rendered than it charges, demands, collects, or receives from any other person for doing a like or contemporaneous service;

"(b) Make or give any undue or unreasonable preference or advantage to any particular person; * * *

"(2) Nothing contained in this section shall prohibit any common carrier from, and no common carrier shall be subject to any fine, penalty or forfeiture, for performing services free or at reduced rates to:

"(a) The United States, the State of Nebraska, or any governmental subdivision thereof;

"(b) Any person transporting property to and from fairs and expositions for exhibition thereat;

"(c) The employees, both present and retired, of such common carrier;

"(d) Any person wherein the object is to provide relief in case of any calamitous visitation;

"(e) Any person transporting property for charitable purposes; or

"(f) Ministers and others giving their entire time to religious or charitable work."

It is clear that exclusive power and jurisdiction to fix the rates of common carriers and to determine all matters with relation to unjust discrimination as to fares and rates is vested in the Railway Commission. It is

further clear that the Legislature has delegated this power by setting up rather precise guidelines, standards, and principles to guide the Railway Commission in its deliberations. The Railway Commission had jurisdiction of the subject matter of the application filed by the applicants, and it appears that in entering the order of dismissal it was exercising its quasi-judicial power to make determinations of fact and law, and enter a judgment disposing of the merits of the application. This observation is necessary in this case because in Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we held that the Railway Commission generally exercises legislative, administrative, and judicial powers. It is clear from the nature of the application and the authority sought to be invoked, the power the Railway Commission was exercising here was quasi-judicial or judicial in nature.

From what we have said, it appears clear, therefore, that the Railway Commission did, without holding a hearing, exercise its judicial power to determine the facts and the law and enter a judgment of dismissal.

The precise and only issue presented in this case is whether applicants were entitled to a hearing of some nature before the Railway Commission. We have no doubt, in proper context, that legislative or administrative power may be exercised without the holding of a hearing and an opportunity to be heard. But here the Legislature has properly delegated judicial power to the Railway Commission. It has required the Railway Commission to inquire into and to determine the facts and make lawful disposition of applications of citizens and carriers alike. The application here invoked the Railway Commission's power to determine the facts, to apply the law, and to enter a judgment thereon. The rules and regulations of the Railway Commission itself set up an orderly procedure by which such applications could be made and the matter brought to the attention of the Railway Commission with full opportunity to be

heard either on questions of law or questions of fact, if such there may be. It appears clear that once the judicial or quasi-judicial powers of the Railway Commission are properly invoked, according to the authorized rules and regulations which the Railway Commission itself has promulgated, its judicial power may not be exercised summarily and without hearing the adversary parties to such applications.

We observe that the Attorney General's opinion, which was apparently the basis upon which the Railway Commission acted, does not say that the Railway Commission is without jurisdiction of the subject matter of the act, or that it is barred from holding a hearing on the subject matter of reduced fares for special classes of passengers. It states, in substance, that if the fact allegations are such as in the application, the Railway Commission could not properly reach a final result which would require such reduced fares, because of the specific prohibitions of the applicable statute. But it seems to be clear that the applicants are entitled to a hearing of some nature upon the very issue of whether the facts as stated in the application could warrant relief. We also observe that the summary denial of this application prevents the consideration by the Railway Commission of any possible amendments or qualifications which could bring it within the terms of the statute, and effectively prevents the uncovering of any related or collateral facts that are not recited in the application or considered by the Attorney General in his opinion. The Railway Commission, pursuant to its rules and regulations, did issue a notice and did schedule a hearing in this matter. The applicable statute, section 75-110.01, R. S. Supp., 1969, provides in part: "After notice of an application or petition has been given as provided by the rules for notice, the commission may process the application or petition without a hearing by use of affidavits if the application or petition is not opposed." We observe that the disposition of this application was done without

the use of affidavits and that the application was opposed. The statement in the applicable statute itself demands from the Railway Commission that a hearing be granted under these circumstances. The statute, section 75-110.01, R. S. Supp., 1969, provides that the Railway Commission shall not deny an application or petition of a common carrier until after it has either given the applicant a hearing thereon, or received the applicant's affidavits and made them a part of the record. We therefore hold that the Railway Commission should have held the hearing, already scheduled under its rules and regulations and the notice issued, to enable the parties to appear and present whatever questions of law or issues of fact which the Railway Commission might have determined, at the time of the hearing, were necessary and proper to a final determination of the issues presented.

We observe that the Railway Commission's order summarily denying the hearing effectively prevented a presentation to it of further and additional facts than those alleged in the application and any request for an appropriate amendment to embrace in the application any further facts that the applicants might seek to develop.

We point out that our holding and decision herein is narrow in scope. We do not determine or hold that there is any merit to the applicants' present application of any nature whatsoever. It would appear from the face of the application that it is totally without merit and under the applicable statute applying to the subject matter, that is, common carrier's rates, the Railway Commission is without power to grant reduced rates on the basis of the facts presented. But we do say that the Railway Commission should have held a hearing that it did, in fact, schedule under its own rules and regulations.

The Railway Commission's order denying a hearing is reversed.

REVERSED.

SPENCER, J., dissenting.

The majority opinion herein requires the Nebraska

State Railway Commission to engage in an exercise in futility. At this point in this controversy I can see no escape from the mandatory application of subsection (1) of section 75-126, R. S. Supp., 1969, forbidding discrimination between persons, nor any escape from the conclusion that the application does not contain facts bringing it within the exclusions in subsection (2) of section 75-126, R. S. Supp., 1969.

McCOWN, J., concurring in result.

Both the majority opinion and the dissent assume, either impliedly or implicitly, that the Nebraska State Railway Commission has no power or authority to order the defendant to establish a special rate classification for off-peak periods for persons over 62 years of age. The foundation for that legal conclusion rests on the assumption that any classification of persons for reduced rates, except for those persons described in subsection (2) of section 75-126, R. S. Supp., 1969, is illegal and discriminatory. That conclusion I do not accept.

Two very obvious classifications of persons who are not mentioned at all in section 75-126, R. S. Supp., 1969, are children and students. In the case of children, the "discrimination" is based solely on age. In the case of students, the "discrimination" is based on occupation. There is no dispute on the part of anyone that the Railway Commission has authority over such rates once established, but the argument is that the authority exists only when the carrier voluntarily established the classification. This distinction in interpreting a statute prohibiting discrimination simply doesn't fit. Particularly is this so where the Railway Commission must specifically approve any rates established by any carrier for the carriage of any classifications of persons or property. It seems clear that a classification limited to persons over 62 years of age, and to off-peak periods in time, is not on its face obviously and conclusively unreasonable and unjustified.

The preferences or advantages aimed at by section 75-

126, R. S. Supp., 1969, are only undue or unreasonable ones. A classification of persons which is justified or reasonable ought not to be deemed illegal simply because a carrier has not voluntarily established it.

It is true that the Railway Commission has no authority to order any rate which is not compensatory. That fact remains for evidence, but it should not be predetermined nor should it affect the jurisdiction or the power and authority of the Railway Commission over the establishment of rates and classifications for the carriage of passengers.

STATE OF NEBRASKA, APPELLEE, V. JACK HOLOUBEK, APPELLANT.
188 N. W. 2d 439

Filed June 25, 1971. No. 37708.

1. **Criminal Law: Witnesses: Burglary.** In a prosecution for burglary, a witness who was only a receiver of the stolen property or an accessory after the fact was not an accomplice of defendant.
2. **Criminal Law: Sentences: Statutes.** A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Robert C. Vondrasek, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found defendant Jack Holoubek guilty of the offense of burglary. The court sentenced him to imprisonment for 5 to 8 years. On appeal he attacks the

sufficiency of the evidence on the ground that an accomplice willfully swore falsely to material matters without corroboration.

The Hinky Dinky Store at 8411 Center Street in Omaha was burglarized October 13 or 14, 1969. Stolen merchandise consisted partly of meat in 2 pound cans and cigarettes. Delivery of the items to that store could be established by distinctive markings on them.

The alleged accomplice was Archie McShannon, owner of a tavern with an expired food permit. He informed on Holoubek and Louis Silvey on October 27, 1969. The substance of McShannon's testimony is as follows: He purchased cigarettes and 30 cans of meat for $60, $20 down, from Holoubek and Silvey at 2:30 a.m., October 14. They told him about breaking and entering a chain store, the method of entry, and difficulty with mud. Those facts, except the connection of Holoubek or Silvey, were corroborated.

Contradictions and evasiveness run through the record of the testimony of McShannon. He delivered 16 cans of meat and 4 packages of Kent cigarettes, with the distinctive markings of the store at 8411 Center Street, to police officers. His explanations of the whereabouts or disposition of the other items were evasive. His reasons for informing were contradictory. His testimony to incriminating statements by Silvey in Holoubek's presence appeared evasive and in part perhaps contradictory. He no doubt could have learned enough details from others to inform falsely against Holoubek and Silvey.

The evidence was clear that McShannon committed no offense worse than an accessory after the fact or a receiver of stolen property. In a prosecution for burglary, a witness who was a receiver of stolen property or an accessory after the fact was not an accomplice of defendant. Cf. §§ 28-201, 28-202, 28-508, and 28-513, R. R. S. 1943; State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161 (1965); Neiden v. State, 120 Neb. 619, 234 N. W.

563 (1931). See 1 Underhill's Criminal Evidence, note 8, § 175, at p. 330 (5th Ed., 1956).

The evidence was sufficient to support the verdict against Holoubek under the general rules of State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970).

Holoubek also asserts that his 5 to 8 year sentence was excessive. The record incorporated no presentence report, but the sentencing hearing in May 1970 imparted two prior felony convictions of Holoubek, then age 37. A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion. State v. Trout, 186 Neb. 477, 183 N. W. 2d 923 (1971). No abuse of discretion appears here.

The judgment is affirmed.

AFFIRMED.

ERNEST ELLIOTT ET AL., APPELLANTS, V. CITY OF PLATTSMOUTH, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

188 N. W. 2d 684

Filed June 25, 1971. No. 37773.

Airports: Municipal Corporations: Words and Phrases. The word "airport" in the clause "any city * * * owning or operating an airport" in the Cities Airport Authorities Act, section 3-502, R. R. S. 1943, means an airport qualified and licensed for public use.

Appeal from the district court for Cass County: WALTER H. SMITH, Judge. Reversed and remanded.

Ronald D. Svoboda and Burbridge & Burbridge, for appellants.

Herbert J. Elworth, Paul E. Fauquet, Francis Casey, and Harold R. Lebens, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This was an action by the individual plaintiffs to enjoin the further operation of an airport authority of the City of Plattsmouth, and to declare the airport authority invalid and nonexistent. After trial, the district court dismissed the plaintiffs' petition and this appeal followed.

The Cities Airport Authorities Act formed the basis for the creation of the authority here. "Any city now or hereafter owning or operating an airport is hereby authorized to create an airport authority * * *." § 3-502, R. R. S. 1943.

The land initially leased by the city in February 1969, had never been used as an airport of any kind. The city did not own or operate any other "airport." The "airport authority" was authorized under resolution dated March 24, 1969. Application for an airport license was not filed by the authority until November 1969, and no license was ever issued until March 27, 1970, when a limited municipal license was issued.

This case is controlled by Bruns v. City of Seward, *ante* p. 658, 185 N. W. 2d 853. The word airport in the clause "any city * * * owning or operating an airport" in section 3-502, R. R. S. 1943, means an airport qualified and licensed for public use. The action of the City of Plattsmouth purporting to create an airport authority was invalid and void.

We do not reach the issues involving appropriations and expenditure of funds.

The judgment is reversed and the cause remanded with directions to enter judgment declaring the airport authority invalid.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE ECKSTEIN, APPELLANT.
188 N. W. 2d 440

Filed June 25, 1971. No. 37854.

Criminal Law: Indictments and Informations: Statutes. An information alleging conduct prohibited generally by one statutory section and specifically by another section charges an offense under the specific section.

Appeal from the district court for Adams County: EDMUND NUSS, Judge. Affirmed.

W. G. Cambridge, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

An information charging defendant Clarence Eckstein with larceny by bailee of an automobile did not allege the value of the automobile. Upon a plea of guilty Eckstein was sentenced to imprisonment from 3 to 5 years. He appeals. He asserts that the information omitted an essential allegation—specific value of the automobile.

The information charged a violation of section 28-540, R. R. S. 1943. The section concludes that an offender is deemed guilty of larceny in the same manner as if the original taking were felonious. Upon conviction he is to be punished accordingly.

Stealing of an automobile is a separate offense without regard to the amount of its value. It is punishable by imprisonment from 1 to 10 years. See § 28-522, R. R. S. 1943. Grand larceny is punishable by imprisonment from 1 to 7 years. See § 28-506, R. R. S. 1943. The court informed Eckstein the maximum penalty was imprisonment for 7 years.

An information alleging conduct prohibited generally

by one statutory section and specifically by another section charges an offense under the specific section. See, Buthman v. State, 131 Neb. 385, 268 N. W. 99 (1936); Graham v. State, 123 Neb. 63, 241 N. W. 786 (1932); Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171 (1931) (dictum); Halbert v. State, 116 Neb. 1, 215 N. W. 459 (1927); Gragg v. State, 112 Neb. 732, 201 N. W. 338 (1924); Mares v. State, 112 Neb. 619, 200 N. W. 448 (1924) (receipt of stolen automobile); Griffith v. State, 94 Neb. 55, 142 N. W. 790 (1913); Wallace v. State, 91 Neb. 158, 135 N. W. 549 (1912); cf. Kruger v. Brainard, 183 Neb. 455, 161 N. W. 2d 520 (1968); A. L. I. Proposed Official Draft, Model Penal Code, § 1.07(d) (1962).

In Lee v. State, 103 Neb. 87, 170 N. W. 359 (1919), the information charged Lee with larceny of an automobile worth $200, a sum large enough for grand larceny. The court, 3 judges dissenting, reversed his conviction for failure of the jury to find the value of the automobile. On the issue before us Lee illustrates asymmetry in the law. Although it harmonizes with some cases decided prior to 1912, Lee today is a wild recessive.

Specific value of the automobile was not an essential allegation against Eckstein. In so concluding, we are not construing the criminal code retroactively. See Bouie v. Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

The other assignments of error, one of which is invalidity of Eckstein's plea, are not well taken. The judgment is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I dissent respectfully. In prosecution upon charge of larceny by bailee proof of value is an essential element of the crime in order that the court may determine punishment for either grand or petit larceny. There is nothing in section 28-540, R. R. S. 1943, to indicate that the measure of punishment depends upon the nature of the property taken rather than its value.

KENNETH P. SHAMBURG, APPELLEE, V. KENNETH R. FOLKERS, APPELLANT.

188 N. W. 2d 723

Filed July 2, 1971. No. 37749.

1. **Witnesses: Trial: Evidence.** The general rule as to an opinion of a lay witness is that the witness may testify only to facts perceived by his senses and may not give his opinion or conclusion.
2. ———: ———: ———. A lay witness may testify to a relevant opinion based upon facts perceived by him if the opinion is of a kind normally formed by a person constantly and correctly and the witness cannot accurately, adequately, or with reasonable facility describe the fundamental facts upon which the opinion is based. In substance such process is under these circumstances description.
3. ———: ———: ———. It is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save error, however, the failure to object to identical or substantially the same incompetent testimony by another witness waives the erroneous ruling in admission of testimony of the first witness.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Healey, Healey, Brown & Burchard, for appellant.

Marti, O'Gara, Dalton & Bruckner, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This action grows out of a head-on motor vehicle collision which occurred during daylight hours near the crest of a hill on a graveled county road known as the Malcolm-Garland road, which runs in an east-west direction. The plaintiff Kenneth P. Shamburg was driving a 1965 Chevrolet ¾-ton pickup east. The defendant Kenneth R. Folkers was driving a 1967 Mercury west. There were no witnesses to the collision save the parties. Folkers cross-petitioned for his damages. The

jury found for Shamburg on his petition and against Folkers on his cross-petition. Judgment was rendered on the verdict. Folkers appeals.

Two questions are presented on this appeal. Folkers contends that the undisputed physical facts show that the Shamburg pickup was across the centerline of the main traveled portion of the road at the time of the collision and therefore Shamburg's right of action is barred by contributory negligence proximately causing the collision, and that the court erred in permitting over objection a lay witness, Schmieding, to testify to his conclusion that the Folkers vehicle was on the wrong side of the highway. Later in the trial the same question in almost identical language was asked and without objection the second witness gave the same answer.

We affirm the verdict and the judgment.

The evidence on the accident facts was produced by the testimony of the two parties, the investigating highway patrolman, two after the collision witnesses, photographs taken by the patrolman, and a diagram and measurements made by the investigating officer. The oral testimony of each of the parties was such that the jury could have, apart from the physical evidence, found that one or the other was, at the moment of impact and immediately prior thereto, on his own proper side of the road.

The investigating officer made measurements of the width of the road and determined that it was 28 feet wide, measured from points along the edge. He stated that all of the 28 feet except about a tire's width on each side was fit for travel. The two vehicles were impaled upon each other and remained tightly jammed together after the accident. The pickup faced to the north of east and the Mercury to the south of west. There was no marked centerline on the road.

The patrolman made the following measurements. (A) With reference to the Folkers' Mercury: (1) From the north edge of the road to the right front tire, 10 feet 11

inches. (2) From the north edge to the right rear tire, 9 feet 5 inches. (3) From the south edge to the left rear tire, 13 feet 2 inches. (4) From the south edge to the left front tire, 12 feet 3 inches. (B) With reference to the Shamburg vehicle: (1) From the south edge to the right front tire, 10 feet. (2) From the south edge to the right rear tire, 7 feet 8 inches. (3) From the north edge to the left rear tire, 15 feet. (4) From the north edge to the hubcap of the left front wheel, 14 feet. This hubcap was detached but lying against the wheel.

It was raining at the time of and just after the accident. There was no evidence of tire or skidmarks of either vehicle. There is a dispute in the testimony as to whether the full 28 feet of the road width was fit for travel.

Folkers' contention that the undisputed physical facts show that the Shamburg vehicle was over the centerline of the main traveled portion of the highway at the time of impact is founded primarily upon the measurements made by the highway patrolman. Essentially the argument is that these measurements amount to undisputed physical facts and show (if Folkers' evidence of an untravelable portion of the north side is disbelieved), that Folkers' vehicle was over the centerline. These same facts, therefore, because of the overlap in the collision of the vehicles show that the Shamburg vehicle was also over the centerline. Folkers points out the patrolman's statement was that about a tire's width on each side of the highway within the 28-foot measurement was not travelable because of the softness of the edges. Folgers argues therefore that the measurement of 14 feet to the left front wheel of the Shamburg vehicle in itself places the vehicle over the center of the highway. He argues further that the Shamburg vehicle was even more over the centerline at the time of impact because the photographs show that the left front of the Shamburg vehicle is displaced inward. He further argues that this alleged fact is verified because the 14-

foot measurement plus the 10-foot measurement and the width of the Shamburg vehicle is greater than the width of the highway and the difference is the inward displacement of the Shamburg vehicle by the impact.

We hold that the physical facts do not indisputably establish the position of the vehicles at the time of the impact. The measurements, if accepted as absolutely accurate, establish only the location of the vehicles after the impact. There was no undisputed centerline of the main traveled portion of the highway. There were no tire marks showing the paths of either vehicle immediately prior to the impact. The amount and direction of movement after impact cannot be ascertained. The measurements themselves are not undisputed physical facts. The testimony of a witness for each party challenged respectively the 7-foot 8-inch measurement with reference to the Shamburg vehicle and the 9-foot 5-inch measurement with reference to the Folkers vehicle. Neither do the 10-foot and 14-foot measurements to the front tires of the Shamburg vehicle support indisputably Folkers' contention that the Shamburg vehicle was displaced inwardly at the left front or if it was how much. Neither vehicle was aligned parallel to the direction of the highway. They were at an angle thereon. The two points of measurement were not made on the same line. The difference between the sum of the two measurements and the measured highway width therefore do not give an accurate measurement of the width of the vehicle.

Folkers cites several cases decided by this court for the "principle" that where the undisputed physical facts show a vehicle was across the centerline of the road at the time of impact that recovery by the driver of the vehicle is barred by reason of contributory negligence proximately contributing to the collision.

An examination of these cases indicates, for reasons already given, that none of them are applicable here. The measurements and the damage to the vehicles here

do not indisputably demonstrate that the plaintiff's vehicle was north of the centerline of the main traveled portion of the highway at and immediately prior to the impact. It may be observed in passing that the "principle" cited by the defendant is not a principle of law at all, but simply a fact finding by the court in cases in which it felt the verdict was clearly contrary to the evidence and that the verdict should have been directed.

The second assignment of error relates to the failure of the trial court to sustain an objection to a question propounded by the plaintiff in redirect examination of a witness, Schmieding, who arrived at the scene of the accident shortly after it occurred. In order to understand the contentions and the ruling in this connection, it is necessary to summarize what occurred immediately before and after the testimony to which objection was made. The cross-examination of this witness covered, among other things, certain photographs of the road which had been taken a few days after the accident. The witness testified that they showed the road's general appearance and condition in the area of the accident. He also on cross-examination testified that the Shamburg pickup was so close to the south edge of the road that in passing around it he took hold of the pickup to keep from slipping into the ditch. He further testified that he disagreed with the patrolman's measurement that the back end of the pickup was 7 feet 8 inches from the edge of the road. Then on redirect the following occurred: "Q. You didn't measure the distances there yourself, did you, Mr. Schmieding? A. No; I didn't have no rule with me. Q. Your testimony here is based on what you observed; is that correct? A. That's right. Q. And *from* your observations, from what you saw when you first arrived on the scene, can you tell us *which vehicle appeared* to be on the *wrong side* the road? MR. HEALEY: Objected to, calling for a conclusion of the witness. COURT: Overruled. You may answer. Q. Did you understand the question? A. Repeat it once

more, please. MR. BRUCKNER: I will have the court reporter read it back. (Question read back.) A. Well, I would say the Mercury was on the wrong side the road because—You want me to go on, or not?" (Emphasis supplied.)

On recross immediately following the above examination the witness was questioned concerning photographs of the vehicles themselves at the accident scene, and the following occurred: "Do these pictures correctly show where the vehicles were when you were there at the scene? A. Well, they do in a way; and still when you look at some of them it don't look quite like it did to me the day I seen them."

In the light of the context the question does not appear to have been directed to eliciting an opinion for the conclusion of the witness as to the position of the vehicles with reference to the centerline at the time of impact. However, it is readily apparent that the question did call for the conclusion or opinion of the witness as to the position of the vehicles with reference to the centerline after they were at rest. The question itself contained an assumption, viz, that only one of the vehicles was across the centerline of the road. The question did call for a conclusion by the witness, without detailing the reasons therefor, as to "which" car was on the wrong side of the road. The evidence would have supported a finding for the defendant's position that the plaintiff's pickup also was across the centerline at the time of impact. The position of the cars after impact with reference to the imaginary centerline was obviously very important to both parties in connection with their arguments to the jury in support of their respective contentions. The measurements made by the investigating officer were not conclusive of the exact position of the cars with reference to the imaginary centerline. The question obviously was a close one. Under these circumstances we cannot say that to permit Schmieding to give his opinion or conclusion, essentially without

foundation, that only the defendant's car was across the centerline and on the "wrong" side of the road was without prejudice. The opinion of the witness called for by the question was closely related to the ultimate issue in the case, namely, whether one or both cars were across the centerline at impact.

The general rule is that the lay witness is to describe what he has observed. Benson v. Peters, 87 Neb. 263, 126 N. W. 1003; Riggs Optical Co. v. Riggs, 132 Neb. 26, 29, 270 N. W. 667. It cannot be said that this is one of those cases where the opinion is of a kind normally formed by a person constantly and correctly and where he could not accurately and adequately with reasonable facility describe the fundamental facts on which the opinion is based. The opinion in this case was not in substance description. Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764. The plaintiff was not entitled to have this witness' speculative conclusion presented to the jury where measurements and photographs made by others were available and received in evidence. Rickertsen v. Carskadon, 169 Neb. 744, 750, 100 N. W. 2d 852; 32 C. J. S., Evidence, § 546(17), p. 141. We are unable to say from the record that the opinion evidence may not have influenced the verdict of the jury. Its reception would normally be considered prejudicial error. Singles v. Union P. R.R. Co., 174 Neb. 816, 119 N. W. 2d 680; Grantham v. Farmers Mutual Ins. Co., 174 Neb. 790, 119 N. W. 2d 519. However, the failure of the defendant to object to the identical question which was later put to another witness and answered in the same way constituted a waiver of the objection and he cannot now complain. Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273; § 25-1141, R. R. S. 1943.

AFFIRMED.

F. HOYTE FREEMAN ET AL., APPELLEES, V. GEORGE P. ROSE, APPELLANT.
188 N. W. 2d 682

Filed July 2, 1971. No. 37828.

Courts: Equity: Trial: Jurisdiction. Where a court of equity obtains jurisdiction of a cause for any purpose, it may retain it for all and may proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

George T. Burr, for appellant.

Keith I. Frederick of Schmid, Ford, Mooney, Frederick & Caporale, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is an action in equity to determine the rights of the parties under a written agreement, and to resolve all claims and rights as to the real estate which was the subject of the agreement. The district court found for the plaintiffs and against the defendant and entered decree foreclosing the defendant from any right, title, or interest in the real estate and dismissed defendant's cross-petition. We affirm the judgment of the district court.

The plaintiffs, F. Hoyte and Ina Freeman, were the owners of approximately 100 acres of land located in Sarpy County, Nebraska. Sometime prior to June 1967, the defendant, George P. Rose, approached Mr. Freeman about leasing the land for use as a sod farm. On June 22, 1967, the parties entered into a written lease agreement which also provided for an option to purchase under certain conditions.

The lease was for a period of 4 years commencing

March 1, 1967, and ending February 28, 1971. The lease provided for an annual rental of $23,450, or $335 for each acre of sod cut from the premises, whichever was greater. Rose was to make the rental payments on the 10th day of each month for the sod cut and removed during the preceding month. On February 28 of each lease year, he was to pay any difference between the amount of rent paid for sod cut during the preceding lease year and the minimum annual rental of $23,450. Rose was also required to submit with each month's rental payment, a list stating the name of each person to whom sod had been sold; the address and legal description of land on which the sod was laid; the amount sold; and whether the purchaser had paid for the sod. As sod was cut from the premises, Rose was also required to reseed the ground as soon as practicable so that all portions of the premises should be in a productive state of sod development. At any time subsequent to February 28, 1971, and prior to April 1, 1971, Rose had the option to purchase the land at a price of $150,000, provided he had not been in default of any of the provisions of the lease during its term. In the event he exercised the option to purchase, he was to receive credit on the purchase price in an amount equal to $10,500 for each year of the lease term during which he had performed all of the covenants of the lease.

For the lease year ending February 28, 1968, the defendant paid $3,015. For the lease year ending February 28, 1969, the defendant paid $6,622.50. For the lease year ending February 28, 1970, the defendant made no payments, but the plaintiffs collected $2,501.45 directly from parties who had purchased sod from the defendant. The defendant did not submit to the plaintiffs any list giving the detailed information as to sod sales as required by the agreement.

In the fall of 1969, the defendant recorded the written agreement in the real estate records of Sarpy County and notified the plaintiffs that he was exercising the

purchase option in the lease. The plaintiffs notified the defendant in writing that he was in default and this action followed.

The defendant testified that he had done extensive work on the land to prepare it for use as a sod farm and that he had an oral agreement with the plaintiff, Hoyte Freeman, that any work he had done on the farm would be credited on the guaranteed minimum rental except for the $335 per acre to be paid as sod was cut. Defendant's cross-petition was based on that work as well as damage to his sod business. Plaintiffs' evidence was that they had prepared and seeded the land as a sod farm several years before the inception of the lease, and that there was no agreement with the defendant except the written agreement.

While the evidence was in conflict as to many issues, it was clearly more than sufficient to support the trial court's decree. In an equity case where the trial court is the trier of facts and there is irreconcilable conflict on a material factual issue, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. See Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96.

Defendant also complains that his cross-petition for damages was dismissed. Where a court of equity obtains jurisdiction of a cause for any purpose, it may retain it for all and may proceed to final determination of a case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Dixon v. O'Connor, 180 Neb. 427, 143 N. W. 2d 364.

The judgment is affirmed.

AFFIRMED.

HARTFORD ACCIDENT & INDEMNITY COMPANY, A CORPORATION, APPELLEE, V. OLSON BROS., INC., A CORPORATION, APPELLANT, IMPLEADED WITH LOZIER CORPORATION, A CORPORATION, APPELLEE.

188 N. W. 2d 699

Filed July 2, 1971. No. 37842.

1. **Insurance: Pleadings: Actions.** An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.
2. **Insurance: Contracts.** A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.
3. **Insurance: Contracts: Property: Damages.** Exclusion in a liability policy excluding from coverage injury to or destruction of any goods sold by the named insured or work completed by the named insured out of which accident arises eliminates any coverage for injury to or destruction of the product furnished or work completed by the named insured.
4. ———: ———: ———: ———. Under exclusion in a liability policy excluding from coverage injury to goods sold or work completed by the named insured, if defect in the product furnished or work completed by the named insured causes damage to other property, there is coverage for such damage to other property.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Gerald P. Laughlin of Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

Cassem, Tierney, Adams & Henatsch, Charles F. Gotch, and T. J. Stouffer, for appellee Hartford Acc. & Ind. Co.

Abrahams, Kaslow & Cassman, for appellee Lozier Corp.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action for a declaratory judgment brought by Hartford Accident & Indemnity Company, the insurer, against Olson Bros., Inc., the insured, and the Lozier Corporation, plaintiff in another action wherein Olson is defendant, to determine the rights of the parties under the terms of an insurance policy issued by Hartford to Olson. The question involved is whether the language of certain "exclusions" in the policy is such that Olson was not afforded coverage in the suit of Lozier against Olson. The trial court determined there was no coverage. Olson appealed. We affirm the judgment of the trial court.

Olson is a roofing contractor. It furnished under contract with Lozier the materials for and constructed and installed in three different stages a roof deck and covering of built-up four-ply paper, asphalt, and gravel on a manufacturing plant belonging to Lozier. The roof in all three stages was of identical materials and construction, consisting of roof deck panels of a wood fiberboard known as "tectum," metal "bulb-tees" which were small "I" beam-like metal strips welded at right angles to the structural roof members at proper distances to support the panel ends, and a gypsum grout which sealed together the bulb-tees and the panels. On top of this deck was laid the paper, asphalt, and gravel. Olson also furnished and installed flashing.

The first stage was completed about April 18, 1963; the second stage about June 21, 1965; and the third about March 24, 1967. Early in 1968 Lozier discovered that the tectum panels of the first two stages had "cupped" or warped so that water stood in each of the panels after rains and the warping caused cracks and check marks to appear in the paper and asphalt which marks or cracks where present generally defined the panel edges. The last stage was beginning to show the same characteristics. The 2-year warranty period of the construction contract had expired.

Lozier on October 20, 1969, brought an action against Olson in which it alleged: The construction of the roof by Olson; that Lozier originally planned to install a conventional steel deck with insulation but upon the recommendation of Olson contracted for the use of tectum; that in discussing the recommendation with Olson, Lozier had pointed out its manufacturing operations involved moisture and heat and the roofing on the plant would have to be satisfactory for these conditions; that Olson orally represented to Lozier a tectum roof would not be affected by moisture and heat and would be satisfactory under the conditions in the Lozier plant; that the representations were made as positive statements of fact with the intent that Lozier should act thereon; that Lozier, believing the representations, relied thereon and on that basis contracted for the roof with Olson; that the representations of Olson were false when made; that the roof was severely affected by heat and moisture involved in the operation of the Lozier plant; that the panels deteriorated and this deterioration was reported to Olson and Olson has failed and refused to remedy the situation; and that Lozier was damaged in the amount of $240,000, "being the fair and reasonable cost of removing said roofing . . . and installing proper roofing thereon."

The plaintiff, Hartford, investigated Lozier's claim and denied Olson coverage under the policy. Hartford then brought this action. Olson counterclaimed for attorneys' fees and expenses in defending Lozier's action. Pending the determination of this suit in the district court, proceedings in Lozier's action against Olson were enjoined.

Hartford's evidence is uncontradicted that there is no damage to property other than the roof and that other physical parts of the building such as steel walls, foundation, etc., are not damaged by the roof deterioration. Olson introduced evidence of a real estate appraiser who testified that the market value of the premises was dam-

aged by reason of the roof deterioration as this was a factor which prospective buyers would consider in making an offer. He also testified that replacement of the roof would restore the market value.

Pertinent policy provisions are the following:

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . .

"Coverage B—property damage

"to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

"Exclusions

"This insurance does not apply: . . .

"(k) to bodily injury or property damage resulting from the failure of the named insured's products or work completed by or for the named insured to perform the function or serve the purpose intended by the named insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured; but this exclusion does not apply to bodily injury or property damage resulting from the active malfunctioning of such products or work;

"(l) to property damage to the named insured's products arising out of such products or any part of such products;

"(m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equip-

ment furnished in connection therewith; . . .."

The pertinent definitions of the policy are as follows:

"Definitions . . .

" 'completed operations hazard' includes bodily injury and property damage arising out of operations *or reliance upon a representation or warranty made at any time with respect thereto,* but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. 'Operations' include materials, parts or equipment furnished in connection therewith . . ..

" 'named insured's products' means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but 'named insured's products' shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;

" 'ocurrence' means an accident, including injurious exposure to conditions, *which results,* during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

. . .

" 'products hazard' includes bodily injury and property damage *arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto,* but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others; . . .." (Emphasis supplied.)

As is to be noted, the policy in question covers what is usually called "products liability" and "completed operations hazard."

The parties apparently agree that the completed roof is the product of the insured, Olson, within the meaning of the policy and that the roof construction is a

completed operation within the meaning of the policy.

Hartford contends that exclusions (l) and (m) eliminate any coverage here as the only damage is to the insured's "product" or "work completed." Olson makes certain contentions with reference to exclusion (k) as it relates to the interpretation of the policy and we will note this later in the opinion.

Olson contends that the burden is upon Hartford to prove facts showing that the risk falls within the exclusions; that the risk is not within the exclusions because the damage is not confined to insured's product or completed work; that the evidence does not show that the damage "arise(s) out of" the insured's work or product; that the phrases "arising out of the product" and "arising out of the work" are ambiguous and susceptible of two constructions, and the one favorable to the insured must be adopted and when this is done the exclusions do not apply; that the damages arise out of reliance upon a false representation made by Olson, i.e., the alleged representations re the qualities of tectum as set forth in Lozier's petition against Olson; and that Hartford's obligation to defend that action must be based upon the allegations of that petition.

The insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821. We assume therefore for the purposes of this case that false representations were made.

Let us analyze the language of the insuring provisions of the policy. It is clear that the "damage" which the policy covers must be "caused by an occurrence." If we then relate this language to the allegations of Lozier's petition, we note that the "occurrence" which is the basis of Lozier's claims is the alleged false representation. The "damages" for which recovery is sought is the roof deterioration or damage to the building. (We disregard for the moment the question of whether the damage is

to the insured product or work.) It seems perfectly clear that under the language of the policy the "occurrence," in this case the "alleged representations and reliance" thereon, must have resulted in the physical damage. The deterioration of the panels and the consequent damage clearly was not caused by the representations. It was not caused by reliance upon such representations. It occurred in spite of such representations or reliance thereon. There is obviously no cause and effect relationship between the representations and the deterioration and none is claimed.

The definitions of "completed operations hazard" and "products hazard" both contain the following language: "property damage arising out of . . . reliance upon a representation or warranty." It is apparent the damage does not arise out of reliance on the representations. It occurred not because of reliance on representations, but would have occurred whether or not such representations were made. If Olson made such representations (or warranties) this might make Olson liable to Lozier for the falsity or breach thereof, but the hazard covered is obviously property damage which occurs on account of the reliance as where some other property is damaged or personal injury occurs because of the product failure. If, for example, a representation had been made that the panels had certain weight-bearing characteristics and, not having such qualities, materials resting upon the roof break through damaging persons or property below, the contractor's insurer in this case would be liable for the damage to the property or persons injured, but not for the loss of the panels themselves. The policy provisions in question clearly do not cover the liabilities contained in the usual construction contract warranties.

Olson contends that exclusions (l) and (m) do not apply because the damage is not confined to the product or work, but that there is damage to the premises as a whole by reason of depreciation in its market value

and therefore the exclusions are inapplicable. The evidence is uncontradicted that the defect is confined to the roof itself. No other portion of the building suffered physical damage. It is only physical damage which the policy covers. Further the evidence is uncontradicted that the replacement of the deck and four-ply roof will completely restore the premises both physically and as to market value.

Olson also contends that exclusions (l) and (m) do not apply because the damage does not arise out of the product or work. This contention with reference to the words "arising out of" apparently involves a very subtle distinction. It is that even if the damage is confined to the product yet the damage does not "arise out of" the product or work but out of something outside the product, namely, the heat and moisture from the plant and therefore the exclusion does not apply. It seems clear to this court that Olson's and Lozier's claim is that the damage does arise out of the product, i.e., its inability to withstand heat and moisture from the plant. This is the entire basis of the claim. The strained construction contended for by Olson as against the clear meaning of the language cannot be sustained. Olson cites Aetna Casualty & Sur. Co. v. Ocean Accident & Guar. Corp., 386 F. 2d 413, to the effect that the words: ". . . 'arising out of' means causally connected with, not proximately caused by. 'But for' causation, i.e., a cause and result relationship, is enough to satisfy this provision of the policy.'" We agree with that court's definition of the term, but it does not help Olson. If the allegations of Olson's petition are true, as we must assume they are, then the warping arises out of or is caused by the lack of certain specific qualities in the tectum.

Olson contends that since in exclusions (l) and (m) no reference is made to the words "or reliance on a representation or warranty," and since these words are not referred to in exclusion (k), the damages which result from false representations are not excluded. The

difficulty with the position, however, is that the representations or reliance thereon are not claimed to have caused the damage to the property. What we have already said applies. Exclusions (l) and (m) clearly exclude damage to the product or work. This makes it unnecessary to consider the contention as to exclusion (k).

"A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean." Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

We are not unmindful of the principles that ambiguities must be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not then the construction which affords coverage must be adopted. There is no ambiguity in the policy. Complexity is not the same as ambiguity.

Exclusionary provisions such as the ones here involved have been uniformly held by the courts to exclude coverage for damage to the insured's product or work. The language "or reliance on a representation or warranty" is apparently not in the hazard definition clauses in the cases cited, or if it is, it is not mentioned because it is not applicable. This difference, if it exists, does not affect the result for the reasons we have already mentioned. Cases which support the conclusions we reach here are the following: Vobill Homes, Inc. v. Hartford Accident & Indem. Co. (La.), 179 So. 2d 496; Volf v. Ocean Accident & Guar. Corp., 50 Cal. 2d 373, 325 P. 2d 987; Liberty Bldg. Co. v. Royal Indem. Co., 177 Cal. App. 2d 583, 2 Cal. Rptr. 329; Home Indemnity Co. v. Miller, 399 F. 2d 78; McGann v. Hobbs Lumber Co., 150 W. Va. 364, 145 S. E. 2d 476; Kendall Plumb-

ing, Inc. v. St. Paul Mercury Ins. Co., 189 Kan. 528, 370 P. 2d 396; Employers Casualty Co. v. Brown-McKee, Inc. (Tex.), 430 S. W. 2d 21; Bryan Constr. Co. v. Employers' Surplus Ins. Co., 110 N. J. Super. 181, 264 A. 2d 752; Aetna Casualty & Surety Co. v. Harvey W. Hottel, Inc., 289 F. 2d 457; Consumers Constr. Co. v. American Motorists Ins. Co., 118 Ill. App. 2d 441, 254 N. E. 2d 265; Pittsburgh Bridge & Iron Works v. Liberty Mutual Ins. Co., 311 F. Supp. 1079.

In Liberty Bldg. Co. v. Royal Indem. Co., *supra*, the court said in construing exclusions substantially similar to (l) and (m): "This Exclusion means that if the insured becomes liable to replace or repair any 'goods or products' or 'premises alienated' or 'work completed' after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under the policy. However, if the accident also caused damage to some other property or caused personal injury, the insured's liability for such damage or injury becomes a liability of the insurer under the policy, and is not excluded. For example, if a contractor builds a house and as a result of an improper mixture of the stucco, water is absorbed into the walls and the stucco cracks and falls off and a child is injured by the falling stucco, the injury to the child would not be excluded under Exclusion (f) but the replacement cost of the stucco would be excluded. Also, if the water absorbed into the walls should reach the interior walls and injure a valuable painting hanging there, the damage to the painting would be recoverable under the policy while the damage to the walls would not."

Olson cites S. L. Rowland Constr. Co. v. St. Paul Fire & Mar. Ins. Co., 72 Wash. 2d 682, 434 P. 2d 725. for its position and we agree that case supports it. There the insured was a general contractor in the construction of a dwelling. The dwelling was substantially damaged by fire because the insured in the course of

construction placed a joist too near a fireplace and the house caught fire and was badly damaged. The insured's policy contained exclusions similar to those we have considered here. That court held, in effect, that only the joist and other portions out of which the accident arose were the insured's product and not the whole house. The insurer was liable for the cost of repairs less whatever was determined finally to be the product. We can find no justification in the policy provisions for the distinction which that court made.

Olson cites Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N. W. 2d 122. This is one of a number of similar cases in which a supplier's product was incorporated into a structure and because it was defective there was damage to the work into which the product was incorporated. In such case where the policy exclusions were similar to the ones under consideration here, the supplier's insurer was liable for the damage except for the cost of the product incorporated into the other work or products. In the above case, the insured supplied defective plaster to the general contractor. The insurer was liable for labor costs, materials other than the plaster necessary to restore the work, and the loss for use of the building. Dakota Block Co. v. Western Casualty & Surety Co., 81 S. D. 212, 132 N. W. 2d 826, is a similar case. Other such cases are cited in the note at 40 N. Y. U. Law Rev. 1180. See, also, St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F. 2d 361.

In Shields v. Hiram C. Gardner, Inc., 92 Idaho 423, 444 P. 2d 38, cited by Olson, there was a genuine ambiguity or conflict between the insuring provisions and the exclusions and the court quite properly construed against the insurer. That case is not applicable here.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

JOHN W. SINNETT AND RONALD E. SINNETT, PARTNERS DOING BUSINESS AS SINNETT BROTHERS CO., APPELLANTS, V. DIAL CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.
188 N. W. 2d 681

Filed July 2, 1971. No. 37882.

1. **Contracts: Damages.** The measure of damages for a breach of contract for specific work at an agreed price is the difference between the stipulated price and the cost of completing the work.
2. **Evidence: Trial: Parties.** Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court to dismiss the action on the motion of the defendant.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Charles Ledwith and Harry Holloway, III, for appellants.

Warren S. Zweiback and Mark L. Laughlin of Monsky, Grodinsky, Cohen, Garfinkle & Zweiback, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action for breach of contract brought by Sinnett Brothers Co., a partnership, against Dial Construction Company. The trial court dismissed the action at the close of the plaintiff's evidence. The plaintiff appeals.

The evidence shows that on October 5, 1968, the plaintiff and the defendant entered into a contract for the cleaning of apartments that had been constructed by the defendant in Omaha, Nebraska. A written memorandum of the agreement, signed by the parties, provided that it was an "Agreement for complete clean up (ready to move in status) of the new 1 and 2 bedroom apartments at Wentworth and Royal Terrace." The agreement then provided that the plaintiff was to furnish labor only,

described the work to be done, and prescribed the price for the labor.

The plaintiff cleaned 25 apartment units in the Wentworth complex and was paid in full for its work. Apparently, some controversy developed over whether the work was satisfactory. On February 18, 1969, John W. Sinnett, one of the partners, talked with Lewis E. Roberts, one of the defendant's officers, and inquired as to when the additional new apartments would be ready for cleaning. Roberts told Sinnett that the plaintiff would not be allowed to clean the new apartments. The plaintiff then commenced this action to recover the amount that would be due for cleaning an additional 165 apartment units.

The controversy is whether the parties contracted with respect to all apartments that might be constructed at the Wentworth and Royal Terrace sites or only as to apartments that had been completed but not occupied on the date the contract was made. The question cannot be determined by reference to the memorandum agreement and the plaintiff produced no testimony on this issue. Thus, there was a failure of proof on this issue.

There was also a failure of proof in regard to damages. If the contract was one for personal services, the employer was entitled to a reduction for the amount earned from other employment. Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287. Sinnett testified that he was "at different places all the time" and that it was "very seldom" that he did not have work in the cleaning business. There was no showing as to the amount the plaintiff earned while it might otherwise have been working at the defendant's apartments.

The plaintiff contends that the contract was not one for personal service but was for work that could have been performed by subordinates or employees. Before the plaintiff could recover on this theory, it would have been necessary to show the expense of additional per-

sonnel to perform the work for the defendant while the partnership was performing contracts for other employers. Jewett v. Wilmot, 51 Neb. 700, 71 N. W. 775; Kreamer v. Irwin, 46 Neb. 827, 65 N. W. 885. In the absence of such evidence there was no way to determine the amount of the plaintiff's damages.

Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court to dismiss the action on the motion of the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

HAROLD A. NELSON ET AL., APPELLANTS, V. R. BELLE ROBERTSON, COUNTY SUPERINTENDENT OF SCHOOLS OF BURT COUNTY, NEBRASKA, APPELLEE.

188 N. W. 2d 720

Filed July 2, 1971. No. 37893.

1. **Statutes.** Statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision.
2. **Statutes: Schools and School Districts: Public Officers and Employees.** Statutory plans for the voluntary dissolution of a school district cease to be available when the district becomes subject to a statute requiring its mandatory dissolution by the county superintendent of schools and the provisions of the statute have been invoked.
3. **Statutes.** In construing a statute, effect must be given, if possible, to all its several parts, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
4. **Statutes: Schools and School Districts.** The provisions of section 79-486, R. S. Supp., 1969, for the dissolution of school districts may not be invoked until the termination of the fifth school year.

Appeal from the district court for Burt County: MERRITT C. WARREN, Judge. Reversed and remanded.

Bernard T. Pipher and Wilson, Barlow & Watson, for appellants.

Ralph M. Anderson, Jr., and Perry, Perry & Witthoff, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Plaintiffs challenge the authority of a county superintendent of schools to dissolve a school district and attach its territory to an adjoining district under the provisions of section 79-486, R. S. Supp., 1969. The trial court affirmed the dissolution and merger ordered by the county superintendent of schools. We reverse the judgment of the district court.

Plaintiffs are residents and electors of School District No. 60 of Burt County, Nebraska, a Class I district. Defendant is the county superintendent of schools of Burt County. Prior to March 31, 1970, School District No. 60 had entered into contracts for 5 consecutive years for the instruction of its pupils with School District No. 14 of Burt County, an adjoining Class III district. The five contracts were on file in the defendant's office.

The defendant complied with all the procedural steps required in section 79-486, R. S. Supp., 1969, and on March 31, 1970, prior to termination of the fifth school year, entered an order dissolving School District No. 60 and attaching its territory to School District No. 14. On that date petitions purporting to be signed by approximately 78 percent of the legal voters of School District No. 60 and the board of education of School District No. 62 were on file with the county committee for the reorganization of school districts of Burt County. The petitions requested the dissolution of School District No. 60 and the attachment of its territory to School District No. 62, an adjoining Class I district. No waiver

of the provisions of the statute had been obtained from the State Board of Education.

The questions presented deal with statutory interpretation. Does a county superintendent of schools have authority to dissolve a school district after it has entered into a contract with another school district for the instruction of its pupils for a fifth consecutive year, but before the termination of the fifth school year? Does the filing of petitions with the county committee under section 79-402, R. S. Supp., 1969, suspend the authority of a county superintendent of schools to act under section 79-486, R. S. Supp., 1969?

It will be noted that the statutes of Nebraska provide several methods for the dissolution, merger, and reorganization of school districts. Section 79-402, R. S. Supp., 1969, provides for a voluntary reorganization by petitioning the county committee for the reorganization of school districts. Section 79-426.23, R. S. Supp., 1969, also provides for the voluntary merger of Class I or II districts with other school districts by petitioning the county committee and holding an election. Sections 79-408, 79-408.01, 79-408.02, and 79-420, R. R. S. 1943, provide for the mandatory and involuntary dissolution and merger of school districts which have been reduced in size or area, or in valuation, or have lost population. Section 79-486, R. S. Supp., 1969, provides: "* * * the county superintendent *shall* dissolve and attach to a neighboring district or districts any school district which, for five consecutive years, *contracts for the instruction of its pupils,* * * *." (Emphasis supplied.) This section also requires mandatory action by the county superintendent, with or without the consent of residents of the school district to be dissolved.

It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision. See, State ex rel. Hartman v. Weiss, 181 Neb. 685, 150 N. W. 2d 264; Keller v. State, 184 Neb. 853, 172

N. W. 2d 782. We have before us several statutes providing for the voluntary and involuntary dissolution of a school district. During the years School District No. 60 was contracting with School District No. 14, it could readily have adopted one of the methods for a voluntary dissolution and reorganization. It did not see fit to do so until after contracting for the fifth year.

Had School District No. 60 become depopulated or reduced in area or valuation as contemplated by sections 79-408, 79-408,01, 79-408.02, or 79-420, R. R. S. 1943, it is readily apparent that the Legislature intended it should be mandatory for the county superintendent of schools to dissolve the school district regardless of any belated efforts to effect a voluntary reorganization. In other words, when a situation such as is contemplated by these statutes develops, the mandatory statutes take effect and control the action to be taken to the exclusion of any voluntary system of reorganization which had formerly been available. The same is true with reference to the mandatory dissolution required by section 79-486, R. S. Supp., 1969. The pendency of voluntary proceedings before the county committee cannot and does not serve to delay the mandatory dissolution required by the statute. Statutory plans for the voluntary dissolution of a school district cease to be available when the district becomes subject to a statute requiring its mandatory dissolution by the county superintendent of schools and the provisions of the statute have been invoked.

It remains to be determined whether or not the order of the county superintendent of schools was ineffective because entered prior to termination of the fifth school year. The statute on its face is ambiguous. The provisions of section 79-486, R. S. Supp., 1969, appear to become effective when a school district "*for five consecutive years, contracts* for the instruction of its pupils." (Emphasis supplied.) When has the school district contracted for a fifth year? There can be but one answer.

It so contracted when it executed the contract for the fifth year and filed the contract in the office of the county superintendent of schools. In the absence of a waiver by the State Board of Education, this would indicate that the county superintendent of schools is then compelled to act. The entry into a contract for the fifth year would appear to be the determining and precipitating factor.

There are, however, other provisions of the statute indicating a contrary legislative intent. The statute confers on a district the right to contract for the education of its students in a neighboring district for the full 5-year period. Of necessity this would hold in abeyance the effective date of any order of dissolution until the fifth school year had terminated. Furthermore, the statute contemplates that under certain circumstances a waiver by the State Board of Education of the statutory provision for dissolution may be obtained. True, the county superintendent of schools must recommend the granting of a waiver, but that decision may not be arbitrarily made. There is no restriction as to the time when such a waiver may be obtained nor as to the period which it may cover. It is apparent that if an order of dissolution should be entered, and thereafter a waiver granted, the latter would necessarily supersede the former. These factors are indicative of a legislative intent to defer the mandatory order of dissolution until the close of the fifth school year. To hold that the district may be dissolved immediately after entering into a contract for the instruction of its pupils for a fifth year would nullify these provisions of the statute. In construing a statute, effect must be given, if possible, to all its several parts, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. See Balka v. School District No. 53-J, 184 Neb. 706, 171 N. W. 2d 646. The provisions of section 79-486, R. S. Supp., 1969, for the dissolution of school districts may not be invoked until the termina-

tion of the fifth school year. See Bierman v. Campbell, 175 Neb. 877, 124 N. W. 2d 918.

We reverse the judgment and remand the cause to the district court with directions to enter judgment denying dissolution and merger as ordered by the county superintendent.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JOHN G. GRAY, APPELLANT.
188 N. W. 2d 705

Filed July 2, 1971. No. 37930.

Criminal Law: Guilty Plea. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.

Appeal from the district court for Keith County: HUGH STUART, Judge. Affirmed.

Padley & Dudden, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The defendant, prosecuted for incest under section 28-906, R. R. S. 1943, challenges the validity of a plea of guilty to the offense and his waiver of the right to counsel. We find these contentions to be without merit and affirm the judgment and sentence of the district court.

The basic standard for determining the validity of a guilty plea was enunciated by this court in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. In that case, this court stated as follows: "The standard for determining

the validity of guilty pleas is enunciated as follows in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162: 'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' "

The failure to appoint counsel for the defendant is challenged. The record reveals that on four different occasions the defendant waived the right to counsel and refused the appointment of an attorney to represent him. He did this twice in writing and twice orally, both before the proceedings in county court on arraignment and in the disposition and sentencing before the district court.

After his arrest the defendant signed a "waiver of right to counsel" which read as follows: "I, John Gray, being over the age of 21, and in sound mind and judgment after being offered a lawyer at the expense of Keith County, Nebraska, to defend me of the charge of incest; and after being advised that such charge constituted a felony, do take these matters into consideration and, therefore, state that I do not wish to be represented by a lawyer and hereby waive my right to counsel." The defendant was brought before the county judge of Keith County and bound over to the district court after telling the county judge that he did not want an attorney or a preliminary hearing. He was properly advised by the county judge as to his right to counsel and that if he could not afford one the court would appoint one and the state would pay for it.

The record reveals that in open proceedings in the district court with the safeguard of the judge conducting the proceedings and observing the defendant, he voluntarily signed the "petition to enter a plea of guilty with right to counsel waived." This petition in pertinent part provided as follows: "(2) I am not represented by an attorney in this matter. However, I understand that I have an absolute right to have an attorney and con-

sult with him in regard to the matter now pending against me and to be represented by counsel in all proceedings in this Court. I further understand that if I do not have funds to employ counsel that the court will appoint competent counsel to represent me and that the fee of such attorney and necessary expense of defense in this court would be paid by the County. * * *

"(4) I believe that I understand the possibility and nature of any defenses I might have in this case. I have been advised that the law provides the following possible punishment, as to Count I, 20 yrs * * *

"(5) I understand that I may, if I so choose, plead 'NOT GUILTY' to any offense charged against me, and that if I choose to plead 'NOT GUILTY' the Constitution guarantees me: (a) the right to a speedy and public trial by jury; (b) the right to see and hear all witnesses against me; (c) the right to use the power and process of the court to compel the production of any evidence, including the attendance of any witnesses in my favor; the right to have the assistance of counsel in my defense at all stages of the proceedings in this court, and if necessary to have the expense of my defense paid by the county; * * *

"(6) I also understand that if I plead 'GUILTY' the court may impose the same punishment as if I had pleaded 'NOT GUILTY', stood trial and been convicted by a jury.

"(7) I declare that no officer or agent of any branch of government (Federal, State, County or City), nor any other person has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive a lighter sentence, or probation, or other form of leniency, if I would plead 'GUILTY'. * * *

"(8) With all of the foregoing statements in mind I specifically state to the court that I do NOT want to have an attorney represent me in this matter; I feel that I do NOT want to consult with an attorney about this

case and I specifically WAIVE any and all right to counsel at any and all stages of the proceedings against me in this court, and I respectfully request the court to hear my petition and accept my plea without my being represented by an attorney.

"(9) I know the court will not accept a plea of 'GUILTY' from anyone who claims to be innocent and, with that in mind and because I make no claim of innocence, I wish to plead 'GUILTY' and respectfully request the court to accept my plea, as follows: With respect to the charge in the information, I plead Guilty as to Count I;

"(10) I feel and believe that I understand the statements set forth in the information and in this petition and I declare that I offer the foregoing plea (or pleas) of 'GUILTY' freely and voluntarily and of my own accord."

The record of the proceedings in the district court reveals that the district judge inquired and discovered from the defendant's own lips that he had read the petition; that he understood it; that he was willing to sign it; and that he, in fact, did sign it in front of the district judge in open court. Out of an abundance of caution, the district court then proceeded to examine the defendant herein as to the contents of this document. The verbatim transcript of this proceeding will not be repeated here. It reveals that the defendant completely understood the charge against him, the statute under which he was charged was read to him verbatim, and the terms "licentiously cohabit," "carnal knowledge," and "licentiously" were explained to the defendant and he assured the court that he understood them. He was advised of his right to trial by jury and the necessity for a unanimous verdict of 12 jurors finding him guilty beyond a reasonable doubt. The different elements of the crime were explained to him and the necessity for proof on each one of them, and the defendant indicated that he understood the contends of his statement and

the explanation by the court in full. The court further examined him as to whether he had any questions that he wanted to ask before the plea was accepted. The information was read to him and the defendant, in open court, pleaded guilty to the charge. The court then explained to the defendant as follows: "The Court: By pleading guilty you are telling me that it is true that you did cohabit with Joy Gray, that you did licentiously know her or carnally know her, that you knew that she was your daughter, that you did this in Keith County, Nebraska, on or about the 15th day of September of this year, is that all true?

"The Defendant: Yes, sir."

Challenged with this apparently irrefutable record, the defendant now argues that he was incapable of understanding the proceedings because he only has an eighth grade education. The record reveals that he is 38 years of age, married, father of 9 children, has held responsible jobs in his life, and has held a position as an electronics technician with T.R.W. Company in Ogallala, Nebraska. His job consisted of repairing electronic machines. The record otherwise reveals that the defendant can read and write, and the district court made a general inquiry which revealed that the defendant is possessed with an intelligent general grasp and orientation. For example, on inquiry from the court as to the attitude of his wife towards the commission of this crime, the defendant testified as follows: "THE COURT: The one that you're—I again caution you, you don't have to answer this question, but, is your wife aware of this charge that has been brought against you?

"THE DEFENDANT: Yes, sir.

"THE COURT: What is her attitude?

"THE DEFENDANT: Pure hate."

It is contended by the defendant that the court did not adequately explain the element of proof of penetration, requisite to establishing his guilt to the charge. The court told him that, "By 'carnal knowledge' I am talking

about that you have engaged in carnal copulation, or, what is commonly known as the marital act of sex. Do you understand that?" It would seem obvious, except for the defendant's argument, that a 38-year-old man, appearing in open court, capable of holding a job as an electronics technician, father of nine children, the oldest of whom is 19 years of age, fully understood that penetration was required in the "marital act of sex."

We have examined the other contentions of the defendant and they are without merit. The record reveals that the defendant voluntarily and intelligently waived his right to counsel, and that his plea of guilty represents a voluntary and intelligent choice among the alternative courses of action that were open to him.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

LEONARD J. MEYER, ADMINISTRATOR, ESTATE OF IVAN A. MEYER, DECEASED, APPELLANT, V. ROY W. LANG, APPELLEE. CONSOLIDATED IN DISTRICT COURT WITH ROY W. LANG, APPELLEE, V. LEONARD J. MEYER, ADMINISTRATOR, ESTATE OF IVAN A. MEYER, DECEASED, APPELLANT.
188 N.W. 2d 692

Filed July 9, 1971. No. 37795.

Evidence: Negligence. The physical facts are sufficient to bar a recovery for negligence only when they indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Morris J. Bruckner of Marti, O'Gara, Dalton & Bruckner, and Vantine A. James, for appellant.

Healey, Healey, Brown & Burchard and Wellensiek, Morrissey & Davis, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

The basis of this action is an automobile accident. Appellee Roy W. Lang obtained a verdict and judgment in the district court. The principal question on appeal is whether the Lang automobile was on its right half of the highway at the time of the collision. We affirm the judgment of the district court.

The accident occurred near a hillcrest, after dark, on a graveled state highway 27 feet 4 inches in width. Neither party was aware of the other's approach until an instant before the collision. Lang states he took his foot off the accelerator and applied his brakes, but his automobile did not leave any skid marks in its path. The operator of the other vehicle was Ivan A. Meyer who died at the scene of the accident. This car left a skid mark 31 feet 8 inches long extending to the apparent point of collision. This mark was 10 feet 9 inches from the north edge of the highway as was also a gouge mark found 4 feet in front of the skid mark. Lang was going east and Meyer, west. From the point of the gouge mark, the Meyer car left tracks to the northwest and into a ditch. The left track commenced at the gouge mark. Another skip-type skid mark appeared about the width of the space between tires to the north of the 31-foot 8-inch long skid mark. Whether this second skid mark was also made by the Meyer car is disputed and it is not definitely shown to be such.

The Meyer car stopped in the north fence row about 142 feet from the point of collision. The Lang car was apparently stopped in its tracks and swung around until it faced to the west of north. The right-front bumper was 12 feet 4 inches from the north edge of the road and the gouge mark was 4 feet in front of the left front of the Lang vehicle. Photographic exhibits show a short skid mark, possibly 3 feet long, running in a northerly

direction from the right front wheel of the Lang automobile. The collision appears to have occurred between approximately the left 16 inches of the front end of each vehicle. Notwithstanding the evident possibility of other skid marks left by the rear wheels of the Lang automobile as it swung around, there is no evidence of them nor is there any evidence of a skid mark on the south side of the road that could have been made by the Meyer vehicle.

Evidence of Lang and of a passenger in the Meyer car is conflicting as each indicates, although not positively, that he thought the respective vehicle occupied by him was on its right half of the road.

The jury apparently arrived at the conclusion that the Meyer, not the Lang, automobile had crossed the centerline onto the left half of the highway. Appellant insists the physical facts conclusively show this to be erroneous and require reversal. The Lang automobile stopped 1 foot 4 inches across the imaginary centerline and the skid mark of the right front wheel extended some distance farther across the line to the north. If the 31-foot 8-inch skid mark was made by the right wheel of the Meyer car, then the left wheels would have been approximately 2 feet to the south or left of center. It is true that no skid mark was found in that location but that fact is not necessarily conclusive as such marks may be left by a wheel on only one side of an automobile. Likewise, the mark left by the right front wheel of the Lang vehicle obviously resulted after the accident and is not conclusive of its position at the moment of impact. It was stopped and swung around to the northwest when struck. In doing so, it could possibly have been swung across the centerline and left the mark as its momentum continued its swing to the west. In addition, the heaviest debris was found south of the centerline of the highway.

The point at issue is a close one under the facts presented and the circumstances urged by appellant as

ground for reversal present a strong likelihood that the accident may have occurred as appellant contends. Yet, we must bear in mind that the jury is the trier of facts and in a case such as this, we cannot upset the jury's verdict unless the physical facts indisputably demonstrate error. "The physical facts are sufficient to bar a recovery for negligence only when they indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged." Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. See, also, Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

Under the circumstances, we do not feel justified in setting aside the verdict of the jury. The judgment of the district court is affirmed.

AFFIRMED.

CECILE A. BENTON, APPELLEE AND CROSS-APPELLANT, V. JOHN M. BENTON, APPELLANT AND CROSS-APPELLEE.
188 N. W. 2d 685

Filed July 9, 1971. No. 37846.

1. **Divorce: Parent and Child: Evidence.** Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody or that the best interests of the children require such action.
2. **Divorce: Parent and Child: Evidence: Appeal and Error.** The trial court's order in child support cases will not be overturned unless there is found an abuse of discretion by the trial court.
3. **Divorce: Parent and Child: Evidence: Courts.** The courts will take judicial notice of the ordinary costs of living and dental, medical, and other familiar costs of living.
4. **Divorce: Parent and Child.** A father is primarily liable for the support of his children independent of the assets of the wife and mother.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Lyman & Meister and Howard P. Olsen, for appellant.

Wright, Simmons, Hancock & Hall, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The questions in this case are: First, whether the custody of 13-year-old Donna Benton should be taken from her mother and given to the remarried father, John M. Benton, and second, the amount of the child support award.

The father, John M. Benton, has the burden of proof to show by convincing evidence changed circumstances demonstrating the unfitness of the mother, Cecile A. Benton, to have the custody of Donna, or that the best interests of Donna require a change to the father. Van Eperen v. Van Eperen, 182 Neb. 579, 156 N. W. 2d 147; Boyer v. Boyer, 183 Neb. 226, 159 N. W. 2d 546; Packett v. Packett, 184 Neb. 769, 172 N. W. 2d 86. The trial court's finding of Cecile A. Benton's fitness will not be disturbed in the absence of an abuse of discretion. Boyer v. Boyer, *supra*.

It serves no purpose to recite the evidence in detail. Donna is with her mother, a registered surgical nurse in Wichita, Kansas. The mother, who was earning $650 a month at the Scottsbluff hospital, is taking advanced training (anethesiology) to better her income and presently has a reduced income of $250 per month. Despite her work, the mother is with Donna in the evenings and weekends. Donna's school record has improved since being in Wichita, and the record shows she is an intelligent active girl with an interest in music, friends, and normal school activities. The record is devoid of any proof of lack of discipline, immoral or improper environment, or lack of love, food, clothing, or the normal care to which this young girl is entitled. Attempts to prove isolated incidents of unkempt clothing and uncleanliness

are not convincing. Donna is an intelligent and persuasive witness. She wants to be with her mother. She loves her father but he has alienated her with his abusive and obscene reference to her mother, brother, and sister. Cecile has never run her father down. The Wichita welfare department approves and recommends Cecile's home and the care she gives Donna. On the other hand, a similar investigation of John Benton's new home in Ft. Collins, Colorado, is persuasive that the decision to ask for Donna was not Velma's (the present Mrs. Benton) and there is a serious probability of personality conflict, an almost inevitable problem in adjusting to a stepmother. John, the father, has had a serious alcohol problem, and the record is inconclusive as to a recurrence.

Donna has an older married sister, Karla. A large part of the record is devoted to a "collateral" attack on Cecile's care of Karla. The main objections, it seems, are that she went with and married a boy of Mexican descent, married too young, lived in an apartment separate from the mother, and did not go to college. These are all answered by the fact that Karla's husband is a responsible man, working steadily as a foreman on his job, and the marriage is a happy one.

Motivational patterns collateral to the best interests of a child are sometimes discoverable in the acute bitterness of custody disputes. Cecile, here, is obviously a woman of strength and determination. Despite the confining burdens of her home life, she is continuing her training and education and advancing toward a better job. John, with an income of $650 per month, has the financial burdens of a new wife and home. Cecile has had to resort to the court to collect all, or almost all, of the payments she has received. The past due payments of $60 per month are still substantially in default. In fact, the issues as to custody in this case were raised in response to Cecile's latest court effort to collect arrears of child support. We are invited to speculate that John's concern over Donna's food, clothing, and parental guid-

ance was only stimulated by the threat of compulsion to contribute to her care. Cecile's industry and ability in earning up to $650 per month is urged self-righteously, in effect, as a legitimate reason for such conduct and attitude. We have long held that, independent of the assets of the wife, the father is primarily liable for the support of his children. Trautman v. Trautman, 184 Neb. 202, 166 N. W. 2d 415. He may not escape this fundamental human and legal responsibility by remarriage and its consequent financial burdens.

The district court increased the child support award from $60 to $80 per month. Donna is 13 years old now, in junior high school. Judicially noticing the minimal costs of caring for Donna (Trautman v. Trautman, *supra),* under present economic conditions, $80 per month is far less than the actual cost of caring for Donna in any decent and acceptable manner. The burden is still heavy on Cecile, beyond the time and attention required of her. We affirm the increased award of child support in the sum of $80 per month.

Cecile cross-appeals the denial of attorney fees. This case originated as a claim for past due child support. The defeated contentions of John were raised in response. Cecile has had the extra burden of attorney fees to successfully defend these charges. Our cases demonstrate a uniform practice to allow attorney fees to the wife in the absence of unusual circumstances. Trautman v. Trautman, *supra.* Cecile is entitled to attorney fees in district court and in this court. The district court also directed the supervision of the Wichita, Kansas, welfare board over Cecile's home. We find no evidence to support this order and it should be deleted.

The judgment of the district court is modified to allow the plaintiff attorney fees of $300 in the district court and $300 in this court, with costs; the provision as to supervision is deleted; and the judgment as to custody and child support is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JESSE NARCISSE, APPELLANT.

188 N. W. 2d 715

Filed July 9, 1971. No. 37853.

1. **Criminal Law: Trial: Evidence: New Trial.** Refusal of the trial court in a criminal case to direct the prosecutor to accept an offer by defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.
2. **Criminal Law: Trial: Evidence.** Testimony of the alleged victim in a criminal prosecution for sodomy with a human being is insufficient for conviction unless it is corroborated in accordance with rules pertaining to other sexual offenses.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Davis, Bailey, Polsky & Huff and Keith A. McIntyre, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found Jesse Narcisse guilty of sodomy and robbery. He appeals. We note these contentions: (1) The evidence was insufficient to carry the case to the jury. (2) The court denied Narcisse a fair trial in failing to direct the prosecutor to accept a pretrial offer to stipulate to acts of sodomy by someone. (3) The law required corroboration of the victim's testimony, but there was none.

The victim, age 21 and a white student at the University of Nebraska at Lincoln, testified as follows: After a long walk and bowling with a girl friend, the victim was returning afoot and alone to his room at Abel Hall the early morning of June 27, 1970. Near the corner of 22nd and Vine Streets in Lincoln, he was accosted by a black stranger "X," who conversed briefly. The victim,

afflicted with petit mal epilepsy since 1959 and weary, then accepted from "X" the offer of an automobile ride to the hall. Instead "X," accompanied by three other blacks, one of whom was Narcisse, drove to a house unknown to the victim. The automobile was a light color, four-door model, between 1962 and 1965. It might have been a Chevrolet, but the victim was not sure.

"X" induced the victim to enter the house. Narcisse accompanied them. From the end of a brief, harmless conversation in the house to the conclusion of the affair the victim was constantly menaced and fearful of great bodily harm. "X" was wielding a knife. Narcisse was participating willingly. Indeed he began the affair by repeatedly striking the victim around an eye, the sharp blows leaving cuts. "X" and Narcisse proceeded alternately and repeatedly to perpetrate copulation per os and per anus upon the victim. They stole $1 plus from him, and they forced him to write a $35 check payable to "U-Save."

The three men having dressed, "X" drove the automobile to U-Save, a gasoline station. The victim sat on the right front seat and Narcisse on the back seat. At the station the attendant altered the payee to "Crest" because he then was unable to cash the check. An attempt to cash the check at Crest proved unsuccessful. "X" then returned to U-Save where the attendant altered the payee to "U-Save." "X's" purchasing 2 cartons of cigarettes and gasoline enabled the attendant to cash the check. "X", receiving the proceeds, kept $11 and one of the cartons. He gave Narcisse two $5 denomination bills and the other carton. He then drove the victim to Abel Hall at 2:30 a.m., Narcisse remaining in the back seat. When the victim left the automobile, "X" offered him a ring which the victim refused. The victim had been a prisoner of the two blacks approximately 2 hours.

The police were not notified until 10 a.m. At a lineup the victim identified Narcisse, saying he was "almost" certain. Testimony of the victim to times, places, and

descriptions was interspersed with statements such as "I am not sure."

The U-Save attendant, Preston Lapointe, generally corroborated the victim's testimony to events there. The automobile was a 1961 model Impala Chevrolet, four-door, and light brown. Lapointe knew Narcisse by name, and he positively identified him in the lineup as well as at the trial. He observed the victim upon the return from Crest: "He was sitting with his right arm on the panel with the window up . . . sullen. He didn't say nothing. He didn't move. Didn't even look."

Narcisse returned afoot to the station, according to Lapointe, 2½ hours later or at 3 a.m. Having requested Lapointe to call a taxicab, he accepted a ride in an automobile occupied by blacks.

Narcisse, age 19, testified to an alibi. Numerous witnesses, including a white candidate for a Ph.D. degree, the candidate's wife, and a Lincoln police officer corroborated the alibi in part. Times, events, and identification of automobiles, clothing, and Narcisse's hair style were sharply disputed.

Aside from the question of corroboration, the evidence was sufficient for conviction on both counts under State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970).

Narcisse's complaint concerning the prosecutor's refusal to stipulate to sodomy is novel in Nebraska. Stipulations that will shorten a trial without prejudice to the parties facilitate administration. We refer to the policy only to emphasize its irrelevance here. A new trial for defendant in the ordinary case would be a strange sanction for breach of a duty to stipulate.

The acts of sodomy were material to identification of Narcisse by the victim. The evidence may have exposed Narcisse to danger greater than that faced by an accused rapist. See A. L. I., Model Penal Code, 264, 276, and 277 (Tent. Dr. No. 4, 1955). The risk dwindles with better juries and greater understanding of the sexual

deviate. Furthermore, to find reversible error would feed a practice of frittering away public interests in social defense. Refusal of a trial court in a criminal case to direct the prosecutor to accept an offer by defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.

The statute defining sodomy does not require corroboration. See § 28-919, R. R. S. 1943. In the absence of statute we have required corroboration of the victim's testimony on charges of rape, assault with intent to commit rape, adultery, incest, and indecent fondling of a minor. See, State v. Gero, 184 Neb. 107, 165 N. W. 2d 371 (1969); Pew v. State, 164 Neb. 735, 83 N. W. 2d 377 (1957); Blue v. State, 86 Neb. 189, 125 N. W. 136 (1910) *(semble);* State v. Witmer, 174 Neb. 449, 118 N. W. 2d 510 (1962); State v. Burton, 174 Neb. 457, 118 N. W. 2d 502 (1962). Under current judicial rules, corroboration generally is sufficient if it covers material facts tending to support testimony of the victim to the principal fact. Pew v. State, *supra.*

"Corroboration requirements are presently common in seduction statutes, occasionally encountered in rape statutes, not usual in legislation dealing with sodomy or indecent exposure. A uniform policy on all sex offenses has a prima facie validity; but Wigmore's attack on *any* such requirement gives one pause in extending it to new areas. In addition, it has been argued that a rigid requirement of corroboration would virtually preclude prosecutions in typical cases of minor sexual assault in dark theaters . . .." A. L. I., Model Penal Code 151 (Proposed Off. Dr., 1962).

On balance testimony of the alleged victim in a criminal prosecution for sodomy with a human being is insufficient for conviction unless it is corroborated in accordance with rules pertaining to other sexual offenses. See Abbott v. State, reversed on rehearing, 113 Neb. 524, 206 N. W. 153 (1925) *(semble).* The evidence tend-

ing to corroborate the victim's testimony was sufficient.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN D. PARROTT, APPELLANT.

188 N. W. 2d 694

Filed July 9, 1971. No. 37855.

Statutes: Intoxicating Liquors: Automobiles: Administrative Law. Tests authorized by statute to be used in determining the alcoholic content present in the body fluid of a person must be performed according to methods approved by the Department of Health.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

James T. Gleason of Collins & Collins, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

The defendant was convicted of driving a motor vehicle while under the influence of intoxicating liquor. Judgment was entered on the verdict and defendant appeals. The question presented is whether or not there was sufficient foundation to sustain the introduction of evidence pertaining to a "breathalyzer" test. We affirm the judgment of the district court.

Tests authorized by statute to be used in determining the alcoholic content present in the body fluid of a person must be performed according to methods approved by the Department of Health. See State v. Fox, 177 Neb. 238, 128 N. W. 2d 576. A police officer testified in detail regarding the testing, preparing, clearing, and use

of the machine which performs the breathalyzer test. He also stated that he had a certificate to operate the machine from the Department of Health, had been instructed in its use by Dr. Bernstein of Creighton University, and was experienced in using it. He was unable to say whether or not he had followed methods approved by the Department of Health, but stated he did follow instructions given by Dr. Bernstein.

Although the issue is a close one, as we view it, the record is sufficient. The witness did testify that he had followed the training and instruction received from Dr. Bernstein and he was authorized to operate the machine by the Department of Health. In addition, Dr. Bernstein testified that in instructing police officers in the use of the machine, he used guidelines set up by the Department of Health. In brief, the officer was instructed in accordance with the methods recommended by the Department of Health; he followed the instructions received, and in so doing, necessarily followed the Department of Health regulations.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., concurring.

The rules of the Department of Health pertaining to breath analysis had been published October 17, 1961, were in force without amendment at the time of trial, and were readily available. Defendant fails to specify any defect in the foundational evidence other than absence of the rules from the record.

The rules were legislative facts. See generally 1 Cooper, State Administrative Law, 175 (1965): 2 Davis, Administrative Law Treatise, § 15.03, p. 353 (1958); Proposed Rules of Evidence for the United States Courts and Magistrates, Revised Draft, Rule 201, Advisory Committee's Note, subdivision (a), 51 F. R. D. 315, at p. 330. The district court may inform itself of legislative facts of agencies under the state Administrative procedures Act by any method it desires. A

party, of course, has a constitutional and statutory right to attack their validity. This court would be mistaken were it to cling to the sporting theory of justice while highway carnage goes on and on.

SPENCER, J., dissenting.

Whether or not the tests actually performed were according to methods approved by the Department of Health on this record is purely speculation and conjecture. I dissent on the basis of State v. Fox, 177 Neb. 238, 128 N. W. 2d 576.

ELMER MINTKEN, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA SURETY COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.
188 N. W. 2d 819

Filed July 9, 1971. No. 37863.

1. **Principal and Agent: Contracts.** An undisclosed principal is ordinarily bound by contracts made on his account by an agent acting within his authority.
2. **Interest: Accounts and Accounting.** A claim is liquidated so as to bear interest where it is determined or readily determinable. It is sufficient if it is ascertainable by computation or a recognized standard.

Appeal from the district court for Madison County: C. THOMAS WHITE, Judge. Affirmed as modified.

Robert M. O'Gara of Marti, O'Gara, Dalton & Bruckner, for appellant.

George M. Moyer, Jr., of Moyer & Moyer, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Elmer Mintken sued the surety on a grain warehouseman bond for the balance due on an alleged sale of corn by Mintken to the principal. The district court directed

a verdict for Mintken, and it rendered judgment for $4,215, the alleged balance due, without interest to date. Defendant appeals. It contends that the sale was made to one other than the principal. Mintken cross-appeals. He contends that he was entitled to interest from date of delivery of the grain to the principal.

The principal on defendant's bond was Davis Feed and Grain, Inc., of which D. E. Davis was president and his wife, secretary. Davis agreed to purchase Mintken's corn crop of 1966 for $1.27 a bushel. He made no disclosure that he was acting as an agent, and Mintken was unaware of the corporation. Mintken completed delivery of the shelled corn to Davis at the farm on September 13, 1966. Davis deposited it in the corporation elevator without delivering to Mintken or anyone else scale tickets or a warehouseman's receipt. A corporation employee unloaded the grain into the elevator without weighing it. Estimates by Mintken and the sheller fixed the quantity of corn at 4,500 bushels. Davis with his personal check subsequently paid $1,500 on the balance due. The corporation was adjudicated a bankrupt.

D. E. Davis had incorporated his business of trucking, feed salesman, and elevator operator. He was president and his wife was secretary. They destroyed the corporate records after the bankruptcy. The record of her testimony implies that the corporation was an alter ego for Davis and his wife: "Q . . . explain what office you held? A. Secretary, I guess. . . . Q. . . . what became of the corporate records . . .? A. Well, after we took bankruptcy we didn't figure there was any need for the records anymore so they were destroyed. We didn't have any place to keep them so they were destroyed." The evidence was uncontradicted.

An undisclosed principal is ordinarily bound by contracts made on his account by an agent acting within his authority. See, Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315 (1952); Restatement Agency 2d, § 186, p. 420. No exception to the rule existed here.

The bond in suit was conditioned upon the faithful performance by the warehouseman of all provisions of law relating to the storage of grain. The Warehouse Act, sections 88-501 and 88-503(3), R. R. S. 1943, provides: (1) That grain received without payment of the price for 30 days was held in storage and (2) that the depositor was entitled to the protection of the grain warehouseman bond. Regardless of the nature of the transaction in other contexts, Mintken became a person storing grain under the act. The district court correctly imposed liability on defendant for the principal amount of $4,215.

The estimates of the quantity of corn sold by Mintken were correct within 280 bushels. The actions of the Davis corporation blocked an accurate determination of the exact amount.

A claim is liquidated so as to bear interest where it is determined or readily determinable. It is sufficient if it is ascertainable by computation or a recognized standard. Mid States Engineering v. Rohde, 182 Neb. 590, 156 N. W. 2d 149 (1968).

Mintken requests that we modify the judgment to allow interest at the legal rate from date of the last delivery of the corn, September 13, 1966. His claim was not the subject of reasonable controversy within the meaning of Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N .W. 2d 536 (1968). We grant the request.

AFFIRMED AS MODIFIED.

G. ROBERT MUCHEMORE, APPELLEE, V. PHILIP E. HEFLIN ET AL., APPELLANTS.
188 N. W. 2d 713

Filed July 9, 1971. No. 37900.

1. **Courts: Equity: Injunction: Damages. A court of equity will not grant injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief.**

2. ———: ———: ———: ———. An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate to prevent a failure of justice.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and dismissed.

Thomas P. Leary, for appellants.

Larry E. Miller, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

Plaintiff filed suit for a permanent injunction to require the defendants to dismantle an artificial drain extending from a downspout on defendants' home to a point near the boundary between the two properties. The district court granted the injunction, ordered the removal of the drain, and restoration of the premises to their original condition. We reverse the judgment of the district court.

The residences of the plaintiff and the defendants are located adjacent to each other in a developed area north of Omaha, Nebraska. The defendants' lot is north and west of the plaintiff's lot, and the drainage in the area is from the northwest to the southeast. Approximately 43,000 square feet from three different residential lots, including the defendants, drain naturally onto the plaintiff's lot. The boundary line between those lots and that of the plaintiff ran generally north and south.

On the northeast corner of the defendants' residence, there was a gutter and downspout which carried the run-off from approximately 900 square feet of defendants' roof. In October 1969, the defendants installed a half-tile drain or trough 3 inches deep, and 34 feet long. It was covered with metal strips containing multiple holes, and baffles were installed every 4 feet. The drain ran from the bottom of the downspout to the base of a large tree which grew on the boundary between

plaintiff and defendants. A rock wall extended along the boundary line, running 17 feet south of the tree, and 13½ feet north of the tree. The undisputed testimony was that whatever water reached the end of the drain went both north and south and percolated along the length of the wall.

There is no evidence that any measureable amount of water from the drain ever reached the plaintiff's land. It is undisputed that there had been no damage of any kind from the time the drain was installed until the time of trial, which was almost a year. There was no testimony whatever that the drain installed by the defendants was negligently constructed. There was no qualified testimony that the drain would either increase or decrease the flow or amount of water from the defendants' property to the plaintiff's property. Neither was there any evidence from any qualified witness that the drain would in any reasonable probability cause damage in the future. The plaintiff's evidence may be summarized as reflecting a fear that he might sustain some possible future damage under unusual circumstances. There were no witnesses except the parties themselves, and they were not engineers or drainage experts.

The crucial fact here is that no damage of any kind has occurred, and the evidence is completely speculative as to the cause, as well as the nature and extent, of any possible future damage. It is fundamental that an injunction will not lie if the right thereto is unclear or the damage complained of is nonexistent. State v. Merritt Brothers Sand & Gravel Co., 180 Neb. 660, 144 N. W. 2d 180.

A court of equity will not grant injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief. Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73.

An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law

inadequate to prevent a failure of justice. City of Omaha v. Rubin, 177 Neb. 314, 128 N. W. 2d 814.

The record here establishes that the plaintiff has no right to injunctive relief. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. HAROLD NUSS, APPELLANT.
188 N. W. 2d 708

Filed July 9, 1971. No. 37904.

Criminal Law: Sentences: Appeal and Error: Courts. This court may reduce the sentence when in its opinion the sentence is excessive.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed as modified.

Leo M. Bayer, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The question on appeal is whether sentences on guilty pleas to 2 counts against Harold Nuss are excessive. The bill of exceptions incorporates a verbatim record of plea and sentencing hearings, and the presentence report.

Count I charged issuance of an insufficient funds check of $90, and Count II, borrowing of more than $35 by a false statement of financial condition. The court sentenced Nuss to imprisonment: 1 to 2 years on Count I, and 2 to 4 years on Count II, the latter sentence to run consecutively to the former. The maximum statutory punishments were 7 and 5 years respectively.

The loan in Count II had been made in April 1968, for

$3,733.70. The check in Count I was 1 of 10 written in December 1968 and January 1969 for a total of $890. Nuss gave no reason for his conduct, but the checks were written approximately when his offense in Count II was discovered. Nuss then departed for California.

Nuss, age 50 at the sentencing hearing in 1970, had completed 2 years of college. Separation from his wife in 1958 led to divorce in 1960 when their only child was age 15. Nuss' criminal record consisted of 5 prior convictions - 4 misdemeanors and 1 felony. All rested on fraudulent checks. Arrest dates and places of imprisonment were March-April 1956, Nevada; June 1958, Maryland; and 1962, Alaska. On the Alaska conviction Nuss received a discharge after 6 months imprisonment on a 1-year sentence.

At the time of arrest Nuss for 1½ years had been making up displays of fireworks. His employer, a California company, paid him a base salary of $500 a month and a commission of $25 a display. He worked satisfactorily, for the company offered to rehire him. He was not an alcoholic, and no health condition was significant.

This court may reduce the sentence when in its opinion the sentence is excessive. Among the elements, some overlapping, we consider are general and individual deterrence, punishment, and rehabilitation. Each case mainly depends on its own facts.

We modify the 2-to-4 year sentence imposed on Nuss so that it shall run concurrently with the other sentence.

AFFIRMED AS MODIFIED.

LYNCH GUY HOLLAMON, APPELLANT, V. EAGLE RACEWAY, INC., A CORPORATION, ET AL., APPELLEES.
188 N. W. 2d 710

Filed July 9, 1971. No. 37938.

1. **Assumption of Risk: Damages.** Where one, knowing and comprehending the danger, voluntarily exposes himself to it, al-

though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.

2. ———: ———. One who participates in the sport of stock car racing assumes the ordinary risks of that sport.
3. **Judgments: Evidence: Parties.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party.
4. ———: ———: ———. Summary judgment is authorized when the moving party is entitled to judgment as a matter of law, it is clear what the truth is, and no genuine issue remains for trial.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Johnston, Grossman & Johnston, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, Kevin Colleran, Ginsburg, Rosenberg, Ginsburg & Krivosha, and Frederick H. Kauffman, for appellee Eagle Raceway, Inc.

Joseph J. Cariotto, for appellee Quattrocchi.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Plaintiff, Lynch Guy Hollamon, brought this action against Eagle Raceway, Inc., a corporation, and Louis S. Quattrocchi, defendants, for injuries sustained May 1, 1965, at the Eagle Raceway when Quattrocchi's racing car went out of control and catapulted into a spot in the pit area where plaintiff was sitting on a chair beside his own stock car which was participating in the races being held on that date. A motion for summary judgment was sustained, dismissing the action as against Eagle Raceway, Inc., which will hereinafter be referred to as defendant. Plaintiff perfected this appeal. We affirm.

The motion was premised on an anticipatory release executed by the plaintiff, and the assumption of the

risks involved in automobile racing. The order of the district court did not specify the precise basis on which the dismissal was sustained.

The release and waiver of liability agreement was judicially established in Brander v. Eagle Raceways, Inc., a declaratory judgment action docketed at Docket 248, Page 194, in the district court for Lancaster County, Nebraska. That case was an equity action in which a jury was called at plaintiff's request. Among the issues presented was the execution and existence of a waiver and release from liability and indemnity agreement given by plaintiff to defendant. The jury determined that the plaintiff signed the release and waiver of liability and indemnity agreement on May 1, 1965, prior to the races and prior to the accident, naming the Eagle Raceways, Inc., as the party to be released. The waiver of liability and indemnity agreement referred to in the verdict of the jury is the identical release agreement involved herein.

Plaintiff sets out 11 assignments of error. The only issue involved is whether or not the summary judgment was properly sustained and the cause of action properly dismissed as against Eagle Raceway, Inc. The answer depends upon whether there is any merit to either of the two principal issues presented: (1) The effect of the waiver and release agreement; and (2) whether plaintiff assumed the risk of injury.

In consideration of permission to enter upon the track premises operated by the defendant the plaintiff executed the release exonerating the defendant from all liability for injuries, and specifically assuming all risks incident to his presence on the premises. Plaintiff in his reply pleads fraud in the execution of the release. Whether the record sufficiently pierces the plaintiff's allegations is an issue it is not necessary for us to meet herein.

We find that the plaintiff, by participating in the racing program May 1, 1965, as a stock car owner, and entering the pit area as a participant in the racing program,

brought himself within the ambit of the maxim "volente non fit injuria," which means where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Munson v. Bishop Clarkson Memorial Hospital, 186 Neb. 778, 186 N. W. 2d 492.

Plaintiff in his brief contends that assumption of risk was not pleaded with sufficient factuality to constitute an issue herein. There is no merit to this contention. The defendant, more than a month before the filing of its second amended answer, had taken plaintiff's deposition exploring the possibility of this defense. Defendant's second amended answer specifically incorporated the defense in paragraph 6. The allegations therein are as follows: "Alleges that any injuries or damages sustained by the plaintiff were the result of risks and dangers which were incidental to the sport of auto racing; that said risks and dangers were known and appreciated by the plaintiff; that the plaintiff voluntarily or deliberately exposed himself to said risks and dangers; and that plaintiff thereby voluntarily assumed the risks of any injuries or damages which he might have sustained." Clearly, this was sufficient to alert plaintiff to the defense of assumption of risk.

The facts, from plaintiff's admissions, show that he was the coowner of an automobile participating in the races on May 1, 1965, sponsored and promoted by defendant. The same day, Louis S. Quattrocchi was driving one of the racing cars entered in the race, and during the course of the first race a malfunction occurred which caused Quattrocchi's automobile to accelerate and to leave the track and catapult into the pit area, injuring plaintiff. The plaintiff's vehicle was parked in a spot reserved for it in the pit area, which was located beyond the oval end of the track which formed the first two turns. Plaintiff's car was parked approximately 150 feet from the

east edge of the track. The pit area was on an incline, and the easternmost or back edge of the pit was about 15 feet above the track, according to plaintiff's estimate. Plaintiff's trailer was parked against the south fence. He was sitting to the rear of his car, almost straight east and perhaps a little south of the roadway leading from the race track to the pit area.

There is no factual dispute that plaintiff knew and appreciated the danger of being in the pit area. Plaintiff's car on previous occasions had generally been in this same area. He was aware that he was directly east of the opening off the first turn while in the pit area. Plaintiff conceded that there are some risks incident to racing, and estimated that if he were to consider racing accidents over the whole racing season they would average one an evening. He stated that he would expect cars to go out of control on occasions, and had considered the possibility of an accident from a car coming into the pit area. While he viewed races from the pits most of the time, he could have gone any place else in the vicinity. There was no restriction confining him to the spot where his car was parked. In this respect, the record is conclusive that the location in the pit area chosen by plaintiff to view the race was the result of his own decision, and was not at the direction or designation of defendant.

One who participates in the sport of stock car racing assumes the ordinary risks of that sport. McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639. This includes one present as a participant in the pit area when a car goes out of control and enters the pit area.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341, 21 A. L. R. 3d 476. In

this instance, we believe that the defendant has met the test.

It is obvious from plaintiff's admissions that he knew and appreciated the danger inherent in his participation in the racing program; that he voluntarily exposed himself to the danger; and that as a proximate result of the danger he sustained his injuries. There is no material fact issue requiring a jury submission, so summary judgment was properly entered. "Summary judgment is authorized when the moving party is entitled to judgment as a matter of law, it is clear what the truth is, and no genuine issue remains for trial." John Deere Co. v. Van Conet, 185 Neb. 135, 174 N. W. 2d 85.

For the reasons given, the judgment is affirmed.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF KAUP. FRED B. KAUP ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.

188 N. W. 2d 891

Filed July 16, 1971. No. 37810.

1. **Statutes: Constitutional Law.** L.B. 1378, Laws 1969, c. 710, § 1, p. 2727, held to be constitutional.
2. **Schools and School Districts: Legislature.** The establishment of school district boundaries is purely a legislative matter.
3. **Schools and School Districts: Statutes: Appeal and Error: Administrative Law.** The courts on appeal cannot deny a change of school district boundaries under a statute enacted after the board entered its order granting a change in school district boundaries under the statute then in effect.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Wilson, Barlow & Watson, for appellant.

William W. Griffin, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This action grows out of an appeal to the district court for Holt County from an order of the board established by subsection (2) of section 79-403, approving a freeholder's petition for change of school district boundaries. The district court affirmed the action of the board except as to one noncontiguous tract.

During the course of the procedures before the board in this matter and three other similar proceedings, appeals in which were tried together in the district court and argued and briefed together in this court, section 79-403, R. R. S. 1943, was amended by the 1969 Legislature. Two amendments are pertinent. L.B. 1378 with the emergency clause became effective August 4, 1969. L.B. 798 with the emergency clause amended L.B. 1378 and became effective September 30, 1969, and then became section 79-403, R. S. Supp., 1969. One of the questions in each of the four cases is which version of the statute is applicable.

In this case the petitioning freeholders requested certain lands described in the petition be transferred from Class I School District No. 22 and Class VI School District No. 25 to Class II School District No. 44. School District 22 is not an accredited grade school district located within accredited high School District No. 25. School District No. 44 is accredited. The petition requesting the transfer was filed with the board August 11, 1969. Notice was published and at a hearing on August 27, 1969, the transfer was approved. It is to be noted that the filing of the petition and the action of the board allowing the transfer all occurred during the time L.B. 1378 was in force.

The appellant makes four assignments of error: (1) Section 79-403, R. S. Supp., 1969 (L.B. 798), should have been held to be controlling; (2) if L.B. 1378 is controlling, then the court should have found that statute unconstitutional because it creates an unreasonable and arbitrary classification in violation of Article III, sec-

tion 18, Constitution of Nebraska, and violates the equal protection clause of the Fourteenth Amendment, section 1, to the Constitution of the United States; (3) the court should have found that the evidence and the petition for transfer did not satisfy the requirments of whichever version of the statute is applicable; and (4) the court should not have permitted more than one tract of land to be transferred. We treat the assignments in order.

As far as is pertinent to the first assignment, the two versions of the statute are as follows: L.B. 1378 provides, ". . . asking to have any tract of land described therein set off from *any* Class I, II or VI school district prior to January 1, 1970, or any time from a nonaccredited Class I, II, III or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto." (Emphasis supplied.) L.B. 798 provides, ". . . asking to have any tract or tracts of land described therein set off from a nonaccredited Class I, II, III or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto."

The basis of the appellant's claim of the applicability in this case of L.B. 798, which was not enacted until after the proceedings on the petition before the board were complete, is not clear. However, it must be that the trial court ought to have applied the later version which was in effect when the case was tried in the district court. This argument must be rejected. The question is one of separation of powers. Establishing school district boundaries is purely a legislative matter. De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296; Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592. In this case the Legislature has delegated that power to the board. The courts can only review the action to see that the statutory requirements are met. The trial court could not act under L.B. 798

as this statute was not in effect when the board acted on the petition. Initial action by the court under L.B. 798 would have been the exercise of a legislative function.

L.B. 1378 authorizes the filing of a petition "asking to have any tract of land described therein set off from *any* Class I, II of VI school district prior to January 1, 1970." (Emphasis supplied.) If, therefore, there is no constitutional impairment of this provision and the other requirements of subsection (2) are met, then both the action of the board and the decree of the court affirming the action of the board were proper.

Is L.B. 1378 unconstitutional because it creates an arbitrary classification or denies equal protection of the law? As already noted, the Legislature has plenary power over the boundaries of school districts. This court has held that the Legislature may act in this matter without the consent or even over the protest of the residents of the districts and may even destroy the districts. De Jonge v. School Dist. of Bloomington, *supra*. It would seem therefore that any claim of a constitutional violation in the exercise of this legislative power must be very clear. In accordance with the usual rule doubts must be resolved in favor of the constitutionality of the statute. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

On the matter of classification the argument of the appellant essentially is that granting to landowners, etc., of property on which children of school age reside in Class I, II, and VI districts, accredited or not, the right to transfer land and not permitting the same privilege to persons in Classes III, IV, and V districts (all of which operate both grade and high schools and differ only in population), is essentially arbitrary because, by removing the requirement that the transfer be from a nonaccredited to an accredited district, the Legislature has removed the sole basis which justified the classification and this makes it local or special legislation for the benefit of the individual.

Appellant cites City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74. In that case this court held unconstitutional a statute creating municipal judgeships in a group of cities, the class of which was closed by limiting its operation to those cities having certain population limits as determined by the 1960 census. Assuming but not deciding that the principle there announced may be applicable to school districts, it is not in point here. We take judicial notice of the legislative history of L.B. 1378, as we may. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582. That history indicates that the objective of the Legislature in enacting this particular version of section 79-403 was to promote the educational interests of the school children involved by permitting voluntary transfers under appropriate conditions of land on which school children reside to the district where they attend school, and also to encourage and promote the enlargements of districts having a kindergarten through twelfth grade program. It is to be noted that the transfer must still be made to an accredited district. These are certainly legitimate legislative purposes and this court cannot say that the classification complained of will not promote these legitimate aims. McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480. In the last-cited case this court said: "A provision in a statute allowing an owner of land in two adjoining school districts to have his property in one district transferred to another district so that his whole unit of property is taxed in the district where his children are to be educated is not an unreasonable classification and is based upon a real and substantial difference in situation." We see no essential difference in the situation in McDonald v. Rentfrow, *supra*, and that involved here.

This and many other courts have said that subject to express constitutional limitations the power of the Legislature over the creation and alteration of school districts is plenary and may be exercised without the con-

sent and even over the protest of the inhabitants of the district. Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37; 78 C. J. S., Schools and School Districts, § 27, p. 663; Board of Education v. Winne, 177 Neb. 431, 129 N. W. 2d 255.

The appellant argues that the time limitation on transfer, to wit: "prior to January 1, 1970," closes the class of persons who may take advantage of the provision. This assumes that no changes could take place in the classes of persons during the period. This is patently a false assumption. Obviously the same arguments could be made in a case where a statute is enacted and shortly thereafter repealed. Such repeal in the absence of a savings clause limits the application of the law to the period of its existence. L.B. 1378 was in fact repealed by L.B. 798 with the emergency clause effective September 30, 1969.

The appellant's contention re the equal protection clause of the United States Constitution is answered by the following language from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, quoted with approval in Halstead v. Rozmiarek, *supra:* " 'Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.' "

The appellant cited no cases and we have found none in which a statute such as this has been held to have violated any of the constitutional provisions relied upon. We hold that L.B. 1378 was constitutional.

An examination of the record in this case shows that all pertinent requirements of subsection (2) of section 79-403 as amended by L.B. 1378 were complied with.

L. B. 1378 provided for the transfer of "any tract of

land." All the land of the appellees was contiguous except one piece. This the trial court eliminated, apparently holding that to meet the requirements of the statute "any tract" all the land must be contiguous. This we believe was correct. Separation of the land by roads or highways did not constitute more than one tract. See Pischel v. Kreycik, 184 Neb. 332, 167 N. W. 2d 388. The term "tract" imports contiguity. The terms "any land" and "the territory" which were considered in Pischel v. Kreycik, *supra,* did not carry any such implication.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF CLARK.
FLORENCE G. CLARK ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.
188 N. W. 2d 889

Filed July 16, 1971. No. 37809.

Schools and School Districts: Statutes: Actions: Administrative Law. A petition to detach land from a school district filed with the board created by section 79-403, R. R. S. 1943, is not a pending action within the meaning of section 49-301, R. R. S. 1943.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions to dismiss.

Wilson, Barlow & Watson, for appellant.

William W. Griffin and Edward E. Hannon, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This case was tried in the district court for Holt County and argued and briefed in this court together with

Kaup v. Sweet, *ante* p. 226, 188 N. W. 2d 891, and contains similar issues. The result is different, however, because we determnie that L.B. 798, Laws 1969, c. 711, § 1, p. 2732, is the version of section 79-403 which is applicable. In this case the board denied the application and the district court on appeal granted the application. We reverse the judgment of the trial court.

The petitioners sought to transfer land owned by them from Class I School Districts Nos. 22 and 86 and from accredited Class VI School District No. 25, within which districts Nos. 22 and 86 are located, to accredited Class II School District No. 44. This transfer was requested under the provisions of subsection (1) of section 79-403.

Both versions of subsection (1) of section 79-403 contain the following provision: "If the land sought to be transferred pursuant to this subsection *is also situated* in a Class VI school district, the land shall not be set off from such Class VI district unless the requirements of subsection (2) of this section have also been met." (Emphasis supplied.)

In this case, the petition was filed on September 24, 1969, and was denied by the board on October 14, 1969. The petition therefore was filed during the effective dates of L.B. 1378, Laws 1969, c. 710, § 1, p. 2727, but not acted upon until L.B. 798 was in effect.

Subsection (2) of L.B. 798 provides only for transfers from "a *nonaccredited* Class I, II, III or VI district in which" the land is situated. The express language of the act as well as its legislative history clearly indicate that where the Class I district is located within an accredited Class VI district no transfer is permitted unless the requirements of subsection (2) are met. Subsection (2) of L.B. 798 provides for the transfer of land only from a nonaccredited Class VI district. The petitioners themselves asked for transfers both from the Class I districts and the accredited Class VI district. Legislative history of which we take judicial notice also shows that Class I districts located within Class VI districts are

to be treated differently than the Class I district not so located. The legislative purpose seems to have been to protect the territorial integrity of an accredited Class VI district.

The appellant Sweet argues that L.B. 798 is applicable because section 79-403 in all its versions is only a procedural statute and does not grant any substantive rights and that therefore the repeal of L.B. 1378 by L.B. 798 makes the provisions of L.B. 798 applicable. The appellees contend that their "cause of action" accrued with the filing of the petition with the board and that the general savings statute, section 49-301, R. R. S. 1943, preserves their "cause of action" under L.B. 1378.

It seems clear to this court that section 79-403 gives both a right and prescribes procedure. Without section 79-403 in some form the petitioners would have no right at all to affect school district boundaries. The right granted is then substantive as distinguished from adjective or procedural. However, the real question is not so much whether the right given is substantive, but rather is it such a right that once the petitioners have taken the initial steps to implement this right can the Legislature take it away from them?

The term "right" has a "wide scope of meaning in its various legal applications and it has no satisfactory definition or explanation except in connection with some concrete conception of the thing out of which it grows." 77 C. J. S., Right, p. 390. The authorities we have cited in Kaup v. Sweet, *supra*, clearly indicate that the inhabitants of school districts have no vested rights in the territorial integrity of school districts. The power of the Legislature is plenary. Such rights as are granted by the statutes can be terminated by the Legislature up until the time the board had acted and the boundary changes had been actually accomplished. Even then the boundaries could be changed by subsequent legislative act.

The question to be answered then becomes one of de-

termining the kind of right to which section 49-301, R. R. S. 1943, is applicable. What pending actions did the Legislature intend to preserve? Section 49-301, R. R. S. 1943, is as follows: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

It is to be observed that the savings act applies to actions pending and causes of action not in suit that have accrued. This court had occasion to construe the general savings act in State ex rel. City of Grand Island v. Union Pacific R.R. Co., 152 Neb. 772, 42 N. W. 2d 867. The court there said: "The word 'actions,' in a legal sense, has been defined as 'a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Webster's New International Dictionary."

The filing of the petition with the board was not the commencement of a judicial proceeding. When L.B. 1378 was repealed, therefore, there was no judicial proceeding pending. Did the appellees have an accrued cause of action under L.B. 1378 at the time it was repealed? We hold that because of plenary power of the Legislature in school boundary matters they did not. This precise question was before the Supreme Court of Wisconsin in State ex rel. Sanderson v. Amundson, 236 Wis. 523, 295 N. W. 691. The general savings act in that case contained the following language: "or rights of action accrued under such statute before the repeal thereof." In that case the petitioner had made application to have land detached from a school district. The board having jurisdiction had denied the application. The petitioner then appealed to an appeals board as provided by statute. Before the order of the appeals board was entered its function was abolished by the Legislature. The petitioner claimed his cause of action or special proceeding was saved by the general savings statute.

The court held otherwise, saying that the savings statute did not apply and that the proceeding before the appeals board was not an "action" within the meaning of the statute.

Since L.B. 798 was the applicable statute and did not authorize transfers from an accredited Class VI district, the trial court erred in allowing the petition. The judgment of the trial court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE FREEHOLDER'S PETITION OF WEBER.
EDWARD E. WEBER ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.
IN RE FREEHOLDER'S PETITION OF BERNT.
DONALD BERNT ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.
188 N. W. 2d 895

Filed July 16, 1971. Nos. 37811, 37812.

Appeals from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions to dismiss.

Wilson, Barlow & Watson, for appellant.

William W. Griffin, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The result here is governed by the opinion in Clark v. Sweet, *ante* p. 232, 188 N. W. 2d 891.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. DANNY C. HATTEN, APPELLANT.
188 N. W. 2d 846

Filed July 16, 1971. No. 37823.

1. **Constitutional Law: Criminal Law: Federal Practice and Procedure.** The standards applicable to waiver of the right against self-incrimination established by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, June 13, 1966, do not have retroactive application.
2. **Constitutional Law: Criminal Law: Waiver.** A defendant may waive a constitutional right or guarantee provided it is done knowingly and voluntarily.
3. **Constitutional Law: Criminal Law: Post Conviction: Evidence.** The burden of proof in a post conviction hearing is on the petitioner.
4. **Constitutional Law: Criminal Law: Attorney at Law: Evidence.** An attorney is not to be deemed ineffective to the point of impairment of constitutional rights of client by viewing his advice retrospectively.

Appeal from the district court for Otoe County: VICTOR H. SCHMIDT, Judge. Affirmed.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Steve Greenberg, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from a denial by the trial court of a motion under the Post Conviction Act to vacate and set aside a conviction of first degree murder committed in the course of a robbery. We affirm the judgment of the trial court. The petitioner was tried before a jury on July 12 to 19, 1965. A verdict of guilty was rendered and on July 30, 1965, the petitioner, pursuant to the verdict, was sentenced to life imprisonment. In this post conviction proceeding the trial court appointed

counsel and an evidentiary hearing was held.

The motion to vacate is founded upon the allegation of ineffective counsel because such counsel allegedly failed in complete disregard of petitioner's "notice and manifest desire to appeal his conviction and sentence" to perfect an appeal. The motion claims meritorious grounds for appeal, to wit: (a) Evidence used at the trial was obtained as the result of unreasonable searches and seizures in violation of constitutional prohibitions; and (b) the petitioner's constitutional rights against self-incrimination were violated. Mention in this opinion of the specifics of allegations underlying (a) and (b) will be made as required.

At the evidentiary hearing the county attorney to whom a confession had been given was called by the petitioner as a witness. The petitioner himself testified at this hearing and there was offered and received in evidence on behalf of the petitioner a partial transcript, prepared at the request of the petitioner's attorney, of the testimony at the trial before the jury. Chief defense counsel at the trial was called as a witness by the State.

In order to obtain a proper perspective of the issue with reference to the claim of ineffective counsel because of failure to appeal, it is necessary to summarize some of the facts surrounding the trial. The record discloses that the petitioner was taken into custody on the day the offense charged occurred and later that day made a written confession of the crime. Prior to the signing of the confession he signed a waiver in writing as follows:

"WAIVER

"I, Danny Charles Hatten, have been advised by Sheriff Hall of Otoe County, Nebraska, that I am under arrest as a result of the shooting of Ella Snyder of near Talmage, Nebraska, and that there will be charges filed against me in connection with that matter.

"Mr. Hall has advised me that I have a right to remain silent and not answer any questions nor give any information regarding this matter, and that it is my

right not to incriminate myself. He has, also, advised me that I may have legal advice in this matter. All these things Sheriff Hall advised me when I first saw him earlier to day and has again told me at this time.

"I understand my rights to have a lawyer and to remain silent, but I wish to waive them and to give a statement regarding the circumstances of the shooting and other matters.

"I am twenty-five years old and I completed the 11th grade in school and am presently taking a correspondence course to complete my highschool education. I have served six years in the United States Army and got an Honorable Discharge in 1963. I consider myself capable of understanding and considering my rights and I have done so in executing this waiver.

"Signed at Nebraska City, Nebraska, this 27 day of March, 1965, at 7:11 o'clock P.M.

" Danny C. Hatten

"WITNESS:
"Betty Peterson Sharp "

The confession stated, among other things, that the petitioner had been engaged in his current job as a salesman only a few weeks; he had financial problems; on March 26 he received an income tax refund and with a portion of this bought a .22 revolver; "I bought the gun to try to get some money"; on the afternoon of the 26th, he used the gun for target practice and reloaded the gun; and the next morning he started out to sell and the home of a customer where he had earlier been nicely treated and made sales "popped into" his mind. He went to the home. He gave the lady some samples of his wares. She made a purchase and went to get her glasses. When she returned he pulled the gun and forced her to write a check for $200. The victim then went to the other room. He followed her, gun in hand. She sat on the bed and he looked for something to tie her with. She threw a pillow at him. "I thought she

was jumping up and I just pulled the trigger. . . . She laid back on the bed. I knew she had been hit by the way she fell back." He left, taking the check, checkbook, and gift samples with him. He and his car were observed shortly after he left the place. He threw out the checkbook and later the gun. He went to a drugstore, cashed the check, and obtained some money orders. The confesson concluded: "I know this statement can be used as evidence against me and I gave it because I just wanted to get it off my chest."

Trial counsel did not enter the picture until sometime later, apparently on March 29.

The circumstances surrounding the waiver and the confession were thoroughly explored both at the evidentiary hearing and at the trial. This evidence discloses that the actual oral admonitions given petitioner concerning his rights to counsel and to remain silent were more extensive than indicated in the waiver. It discloses he was advised he would be charged with a crime, the nature of which would depend upon the outcome of shooting the victim; that he had the right to an attorney and to remain silent; that anything he said would be reduced to writing and used against him; that all of this took place before interrogation began; that no promise was given nor threats made; and that no coercion of any kind preceded or accompanied the interrogation and confession. The findings of the court as to voluntariness of the confession and that his right to counsel and against self-incrimination were intelligently and voluntarily waived under the constitutional standards prevailing prior to June 13, 1966, the date of the opinion in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, were fully justified. The standards laid down in that case do not apply to convictions prior to that date. Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

At the trial the voluntariness of the confession was attacked unsuccessfully.

The trial strategy of counsel was to save the petitioner from the electric chair by admitting the act, but attempting to show, save for the fact that the act was committed in the course of a felony, that the mental state of the petitioner was such that it did not characterize first degree murder and did not deserve the death penalty. This strategy was successful.

The evidence adduced at the evidentiary hearing was primarily directed to the issue of ineffective counsel because of failure to appeal. The evidence on the point clearly justified the trial court's denial of the motion.

Petitioner testified as follows. After trial he discussed the matter of appeal with both his attorneys. They asked him whether he wanted to appeal or not. He told them he wanted to discuss it with his wife and mother. Two days later he notified them he wanted to appeal. He testified that after his confinement in the penal complex he wrote one letter asking the status of his appeal. Counsel did not answer. He wrote a second letter and this time received a reply stating he had signed a waiver of his right to appeal. He did not have copies of his letters or replies. He did not recall signing any papers. He stated he talked to his attorney only twice about the appeal, once during trial and then on July 30, 1965. He stated he never saw him at all between July 19 and July 30, 1965. He acknowledged the signature on the written waiver of appeal as his but he does not know how it got there. The waiver was captioned in the case and is as follows:

"Comes now the defendant herein and on this 17th day of August, 1965, hereby waives his right of appeal in this matter.

"(Signed) Danny C. Hatten

DANNY CHARLES HATTEN"

Counsel who represented the defendant at the jury trial was called by the State. He testified he had five conferences with the petitioner following the jury ver-

dict on July 19, 1965. Those were on July 20, 21, 27, 28, and 30, 1965. This is borne out by copy of the time records submitted in support of claim to the county for services. Counsel testified that at these conferences a new trial and matter of appeal were discussed. The petitioner decided against appeal because the possibility of the death penalty in the event of a second conviction "didn't appeal to the defendant at all." The jury had at one time voted seven to five for the death penalty. On July 27, 1965, the petitioner made his decision not to appeal. After petitioner's commitment to the penal complex, counsel visited him there and it was at this time that the waiver was signed on August 17, 1965. The correspondence with the petitioner was introduced. The first letter from the petitioner was dated August 16, 1966. It did not mention the appeal, but expressed a desire for a conference. This letter was answered on August 19, 1966. The next letter from the petitioner was dated March 25, 1967. It mentioned for the first time the matter of appeal and referred to matters he had found out since being in the penal complex. This letter was answered March 29, 1967.

A defendant may waive a constitutional right or guarantee provided it is done knowingly and voluntarily. State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5. The evidence clearly supports a knowing and voluntary waiver and the reason appears to have been a desire on the part of the petitioner to avoid the risk of a possible death penalty on retrial. At the time of this waiver the question of a greater punishment on retrial had not yet become a constitutional issue. It was then and apparently still may be a real hazard. North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed 2d 656; Moon v. Maryland, 398 U. S. 319, 90 S. Ct. 1730, 26 L. Ed. 2d 262. Not yet determined is the question whether a jury may impose a more severe sentence on retrial. Skipper v. Cox, 320 F. Supp. 934.

The petitioner contends that trial counsel should have

appealed and raised the issue of arrest without probable cause and then on retrial would have been in a position to move to suppress, because they were the fruits of an illegal arrest, the confession, and certain documentary evidence taken from the petitioner's car. No evidence was introduced by the petitioner to specifically support the proposition of arrest without probable cause. The testimony in the partial transcript from the trial and that presented at the evidentiary hearing, for reasons already mentioned, namely, the possession and cashing by the petitioner of the victim's check, the purchase of the gun, the presence of the petitioner near the scene shortly after the event, plus the apparent ability of the victim to make a statement before her death, leads to the conclusion that the arresting officers were in possession of information which gave probable cause. Otherwise the almost immediate apprehension of the petitioner cannot be explained. This clearly disposes of the question of illegality of the arrest. State v. Agnew, 184 Neb. 700, 171 N. W. 2d 542; State v. Harding, 184 Neb. 159, 165 N. W. 2d 723; State v. Perez, 182 Neb. 680, 157 N. W. 2d 162.

On question of the validity of search of the automobile in connection with lawful arrest, see State v. Putnam, 178 Neb. 445, 133 N. W. 2d 605, and cases collected at 19 A. L. R. 3d 727, 775. The burden of proof in this post conviction hearing was on petitioner. He did not at the evidentiary hearing explore the circumstances of the search of the auto. The only evidence he introduced on the point was his own statement that he did not consent to the search. If the search was made in appropriate connection with a valid arrest his lack of consent was immaterial. He was arrested at his home. He went there by automobile. It apparently was nearby. More than lack of consent would have to be shown to make the search invalid. All we have said assumes that there was no warrant for the search. The petitioner made no attempt to show that there was no warrant. There is

nothing in the record to indicate that the motions to suppress would probably have succeeded. Petitioner has not shown he was prejudiced. United States v. Maroney, 408 F. 2d 1186.

The petitioner claims his rights against self-incrimination were violated because, after giving his confession, he was taken to the hospital for identification by the victim who was then critically ill from her wounds and who in fact later died. The petitioner's constitutional rights in this connection were not violated. See Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, where viewing in the hospital was held to be imperative because it was uncertain whether the victim would survive. That case also holds that United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, and Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, do not have retroactive application. See, also, People v. Gersbacher, 44 Ill. 2d 321, 255 N. E. 2d 429.

The burden of proof was on the petitioner to establish a basis for relief. State v. Rapp, 186 Neb. 735, 186 N. W. 2d 482. The petitioner in this case does not maintain he is innocent. His argument essentially is that if his trial counsel had foreseen future developments of the law and been able to persuade the courts to apply them in petitioner's case, then it would have been much more difficult to convict him or he might possibly have been acquitted. An attorney is not to be deemed ineffective to the point of impairment of constitutional rights of client by viewing his advice retrospectively. Henderson v. Cardwell, 426 F. 2d 150. In addition to waiving his right of appeal the petitioner has also not shown meritorious grounds for an appeal. State v. Myles, 187 Neb. 105, 187 N. W. 2d 584.

AFFIRMED.

IN RE APPLICATION OF PHILIP G. SCHMER.
PHILIP G. SCHMER, APPELLANT, IMPLEADED WITH ERNEST LIHS, APPELLEE, V. PAUL ABLER DOING BUSINESS AS CENTRAL TRANSPORT COMPANY, APPELLEE, CLARK BROS. TRANSFER, INC., INTERVENER-APPELLEE.

188 N. W. 2d 696

Filed July 16, 1971. No. 37884.

1. **Statutes: Public Service Commissions: Carriers: Appeal and Error.** The statute governing the transfer of certificates of public convenience and necessity is permissive in terms, not mandatory, and an order of the Nebraska State Railway Commission pertaining to a transfer will be sustained unless it appears to be unreasonable and arbitrary.
2. **Contracts: Public Service Commissions: Carriers: Equity: Specific Performance.** It is generally held that the necessity of obtaining the approval of the Nebraska State Railway Commission to transfer a certificate of public convenience and necessity does not preclude a court of equity from decreeing specific performance of an agreement to transfer such a certificate, subject to approval by the commission.
3. **Contracts: Public Service Commissions: Powers: Carriers.** The Nebraska State Railway Commission does not have authority to determine the validity of contracts for the purchase of certificates of public convenience and necessity.
4. ———: ———: ———: ———. The existence of a dispute regarding the enforceability of a contract for the transfer of a certificate of public convenience and necessity does not deprive the Nebraska State Railway Commission of power to approve the transfer.

Appeal from the Nebraska State Railway Commission. Reversed.

Moyer & Moyer and Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

Ernest Lihs, pro se.

Acklie & Peterson, for appellee.

Kutak, Rock, Campbell & Peters, for intervener-appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an appeal from orders of the Nebraska State Railway Commission denying an application for transfer of a certificate of public convenience and necessity. The orders of the railway commission are reversed.

One Ernest Lihs, holder of a certificate of public convenience and necessity as a motor carrier, joined with applicant Philip G. Schmer in an application to the railway commissoin for approval of a transfer of the certificate to Schmer. The application states it was made pursuant to an oral agreement for the sale of the certificate to Schmer for a consideration of $2,000. Intervener and protestant objected to the transfer. Subsequently Lihs notified the railway commission he had acted "erroneously" when he joined in the application and no longer desired to transfer the certificate. Thereupon the railway commission denied the application because of the absence of a continuing consent to it by the transferor. Later Lihs asked that his certificate be canceled and an order was entered revoking the certificate. No hearing on the merits of the application was had. Any decision must be based solely on the pleadings filed and the orders of the railway commission.

Where a certificate of public convenience and necessity is not dormant, it may be transferred on approval of the railway commission if the transfer will be consistent with the public interest, will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed. See Transit Homes, Inc. v. National Trailer Convoy, Inc., 173 Neb. 391, 113 N. W. 2d 638.

The statute governing the transfer of certificates of public convenience and necessity is permissive in terms, not mandatory, and an order of the railway commission pertaining to a transfer will be sustained unless it appears to be unreasonable and arbitrary. See, Transit Homes, Inc. v. National Trailer Convoy, Inc., *supra;* Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684.

No evidence having been taken, no basis exists for a finding that the elements required for a transfer of the certificate are not present nor was such a finding made. On this record it appears that the transfer might possibly be entitled to approval. To deny it without a hearing ordinarily imports an unreasonable and arbitrary act.

It is generally held that the necessity of obtaining the approval of the railway commission to transfer a certificate of public convenience and necessity does not preclude a court of equity from decreeing specific performance of an agreement to transfer such a certificate, subject to approval by the railway commission. See, Watson Bros. Transp. Co., Inc. v. Jaffa (8th Cir., 1944), 143 F. 2d 340; Lennon v. Habit, 216 N. C. 141, 4 S. E. 2d 339; Royal Blue Coaches, Inc. v. Delaware River Coach Lines, Inc., 140 N. J. Eq. 19, 52 A. 2d 763, 2 N. J. 73, 65 A. 2d 264; 13 Am. Jur. 2d, Carriers, § 93, p. 640.

The railway commission does not have authority to determine the validity of contracts for the purchase of certificates of public convenience and necessity. See Watson Bros. Transp. Co., Inc. v. Jaffa, *supra*.

We have here a situation presented that cannot be resolved by either the railway commission or a court of equity acting alone. Each has exclusive jurisdiction of a portion of the problem presented and one or the other must take the first step toward a solution. A court of equity can require specific performance by the parties but cannot control the discretion of the railway commission. The railway commission can grant permission to the parties to effect the transfer but cannot require it. In this instance, the first step taken by the parties was before the railway commission. The railway commission had jurisdiction to determine the application for a transfer on its merits and if entitled to approval, to enter an order accordingly. This, as previously pointed out, would be an order permissive in nature and the dispute between the par-

ties as to the validity of the contract would remain for resolution by a court of equity. We cannot see that it is material whether the railway commission or the court acts first. The existence of a dispute regarding the enforceability of a contract for the transfer of a certificate does not deprive the railway commission of power to approve the transfer. See Walker v. United States, 208 F. Supp. 388 (1962).

Under the existing circumstances, the order of the railway commission refusing a hearing on the merits of the application, and revoking the certificate pursuant to Lihs' request, are tantamount to, and have the same effect as, a finding that the agreement for a transfer of the certificate is invalid and unenforceable. This is a usurpation of the powers of a court of equity and constitutes an unreasonable and arbitrary disposition of the case.

The question pertaining to approval or disapproval of the application for transfer of the certificate of public convenience and necessity should be determined on its merits, and if approval is given, the interested parties may then apply to a court of equity for a determination regarding the validity of the contract. The orders of the Nebraska State Railway Commission are reversed.

REVERSED.

GARY M. HANSEN, DOING BUSINESS AS HANSEN FLYING SERVICE, APPELLEE, V. ARTHUR J. ABBOTT, APPELLANT.
188 N. W. 2d 717

Filed July 16, 1971. No. 37911.

1. **Accounts and Accounting: Contracts.** An account stated is an agreement, express or implied, between the parties, who have had previous transactions with each other, fixing and determining the amount due from one to the other.
2. ———: ———. In creating an account stated, the minds of the parties thereto must meet and understand that a final ad-

justment of the respective demands of each upon the other is being made.

3. **Accounts and Accounting: Contracts: Debtor and Creditor: Payment.** In the absence of fraud, mistake, or duress, the giving of a check by a debtor to his creditor in payment of his account, without clearly defined reservations, will ordinarily create an account stated.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

E. A. Anderson and Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellant.

Michael V. Smith, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action on an account stated. A check, on which payment was subsequently stopped, was given by defendant to plaintiff for the full amount of the account. Plaintiff's motion for a directed verdict was sustained and he recovered judgment. We affirm the judgment of the district court.

Defendant employed plaintiff to repair a severely damaged airplane. There was no preliminary agreement relative to the amount to be charged for making the repairs. The plane was repaired and the adequacy of the repairs is not questioned. An itemized statement of the charges for repairing the plane was forwarded to defendant. Thereafter defendant called at plaintiff's place of business and a copy of the statement was handed to him. Defendant looked the statement over and protested that the bill was "awful high." After some further discussion, defendant made out a check for the full amount of the statement and gave it to plaintiff. A receipt for the payment was then given to defendant. Subsequently defendant stopped payment on the check and this action was instituted.

Defendant has not pleaded, nor does the evidence indicate, that the check was given as the result of fraud, mistake, or duress. It is clear that defendant voluntarily delivered his check with a view to paying his account in full on the basis of the statement tendered, notwithstanding any reservations he may have had regarding its reasonableness. Under such circumstances, does the giving of the check create an account stated?

An account stated is an agreement, express or implied, between the parties, who have had previous transactions with each other, fixing and determining the amount due from one to the other. See, Jorgensen v. Kingsley, 60 Neb. 44, 82 N. W. 104; Bingaman v. Huntley, 139 Neb. 819, 299 N. W. 180.

In creating an account stated, the minds of the parties thereto must meet and understand that a final adjustment of the respective demands of each upon the other is being made. See Martin Milling Co. v. Evelyn, 179 Neb. 31, 136 N. W. 2d 177.

These rules must be applied as of the time of the final transaction between the parties and without reference to a later change of mind by one of them. Without a doubt, the parties, at the time of their discussion and of the exchange of the check and the receipt, were aware that they were then determining, fixing, and settling the amount due with a view to its final adjustment and determination. There was, on the basis of these undisputed facts, positive evidence of an account stated. In Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, it is stated: "If the defendant had given a check for this whole account, then under well settled principles this would have operated as an account stated, that is, an agreement that the account was correct. * * *

"While the transaction in this case was not an account stated as to the whole account, it was an account stated as to the items for which checks were given."

Defendant contends that the giving of the check, although admissible as evidence of an account stated, is

not conclusive and will not sustain a directed verdict. Under the circumstances in this case, we must disagree. Defendant was fully aware of all the attendant circumstances and of what he was doing when he gave his check in full payment of the account. There was no mistake, fraud, or similar element involved. The evidence in this respect is clear and undisputed. Certainly, one who freely pays an account, even though he has expressed dissatisfaction with it, does so with the intent to assent to it and with awareness that it is a final determination of all matters involved therein.

In R. L. Polk & Co. v. Strickler (Ill. App.), 107 N. E. 2d 59, it was held: "Where dispute between buyer and seller as to amount to be charged for sale of mailing lists and services was settled by giving of note, the note constituted an account stated and dispute over amount to be charged was no defense to action on note."

In Hammond Lumber Co. v. Richardson Bldg. & Eng. Co., Inc., 209 Cal. 82, 285 P. 851, it is said: "The execution and acceptance of a promissory note for the balance of an unsettled account constitute the stating of an account between the parties."

In Caneer v. Kent, 342 Mo. 878, 119 S. W. 2d 214, it is held: "When parties having mutual matters of account between them growing out of a contract, deliberately account together and state a balance, and the party who, in such accounting is found indebted to the other, pays the debt or gives a written obligation for its payment this settlement is so far conclusive between the parties that it cannot be reopened either at law or at equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment." See, also, Wallace v. Crawford, 21 Cal. App. 2d 394, 69 P. 2d 455; Van Voorhis v. Pembroke, 267 N. Y. S. 907, 239 App. Div.143.

The judgment of the district court is affirmed.

AFFIRMED.

RAYMOND S. THOMPSON, III, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A BODY POLITIC AND CORPORATE, APPELLANT.
188 N. W. 2d 840

Filed July 16, 1971. No. 37931.

1. **State: Constitutional Law: Colleges and Universities: Domicile.** A state may constitutionally charge a nonresident a higher tuition rate than that charged a resident.
2. ———: ———: ———: ———. An original durational residency requirement to qualify as a resident for tuition purposes is constitutional.
3. ———: ———: ———: ———. A durational residency requirement for tuition purposes does not constitute a penalty upon the exercise of the constitutional right of interstate travel, and such a requirement should be tested under the traditional equal protection standards.
4. ———: ———: ———: ———. A state has the power to define a resident for purposes of tuition differently than a resident for other purposes.
5. **State: Constitutional Law: Colleges and Universities: Domicile: Statutes.** The test of whether a state statute regulating residency for tuition purposes meets the traditional equal protection standards turns on whether a reasonable basis for classification exists that is related to a legitimate objective of the state.
6. **State: Constitutional Law: Statutes.** In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its law are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.
7. **Constitutional Law: Statutes.** A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
8. **State: Constitutional Law: Colleges and Universities: Statutes: Domicile.** In classifying students for the purpose of charging tuition, the State of Nebraska has the legitimate objective of attempting to achieve a partial cost equalization between those persons who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state.
9. **State: Constitutional Law: Colleges and Universities: Domicile.** The State of Nebraska has a valid interest in providing lower

tuition charges to those who have demonstrated by a continuous residency of 4 months, independent of school attendance, a bona fide intention of remaining as permanent residents and making a greater contribution to the state's economy and future.

10. **State: Constitutional Law: Statutes.** Section 85-502, R. R. S. 1943, is a valid exercise of legislative power to classify, does not infringe upon rights protected by Article I, section 1 or 3, of the Constitution of the State of Nebraska, or the Fourteenth Amendment to the Constitution of the United States, and is valid and constitutional.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Cline, Williams, Wright, Johnson & Oldfather and Kevin Colleran, for appellant.

Healey, Healey, Brown & Burchard, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The basic questions involved here are: (1) Whether it is constitutionally permissible for the State of Nebraska to charge a higher college tuition fee to nonresidents, and (2) whether it is constitutionally permissible to *require* 4 months *continuous* residence independent of attendance at an institution of learning in this state.

Section 85-502, R. R. S. 1943, in pertinent part provides as follows: "A person shall not be deemed to have established a domicile in this state, for the purpose of sections 85-501 to 85-504, unless:

"(1) Such person is of legal age and shall have actually resided in this state continuously for four months with the intention of making this state his or her permanent residence. * * *

"No such person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state, * * *." (Emphasis supplied.)

The district court held the last (italicized) sentence of section 85-502, R. R. S. 1943, unconstitutional and severable from the other sections of the statute, thus permitting 4 months of student attendance and residence to satisfy the requirements of the statute. We hold the entire statute constitutional and reverse the judgment of the district court.

At the outset, it is important that we narrow the issues in this case. Since the district court's decision, the United State Supreme Court has affirmed the three-judge federal court decision in Starns v. Malkerson, No. 4-70 Civ. 26 (unpublished) (D. Minn., Sept. 22, 1970), affirmed without opinion, 401 U. S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971). Starns is close to the problem we have here, and as we shall see, is controlling of our holding herein. It now appears, from the briefs and oral argument, that the parties are in agreement a state may constitutionally charge a nonresident a higher tuition rate than that charged a resident. It further appears as undisputed that an original durational residency requirement to *qualify* as a resident for tuition purposes is constitutional. Starns v. Malkerson, *supra;* Kirk v. Board of Regents of University of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), appeal dismissed, 396 U. S. 554, 90 S. Ct. 754, 24 L. Ed. 2d 746; Landwehr v. Regents of University of Colorado, 156 Colo. 1, 396 P. 2d 451; *Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600;* Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491.

Nevertheless, the impact of Shapiro must be briefly examined. In it are the germinal seeds of this litigation. The limit of its reach illumines the path of our decision. Shapiro held that a state residency requirement for welfare payments penalized a fundamental constitutional right to interstate travel and that such a classification was not justified by any *compelling* state interest. Foreshadowing the questions raised in this case, in a footnote to Shapiro, the court said: "We imply no view of the valid-

ity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." Answering this same question (Shapiro's impact) the Starns decision, as affirmed by the United States Supreme Court said: "For the reasons above, we conclude that this is not a case of an infringement of a fundamental right and thus the exacting standards of the compelling state interest test have no application. Unlike *Shapiro,* we find the *one-year durational residence requirement challenged here* does not constitute a penalty upon the exercise of the constitutional right of interstate travel and thus the regulations constitutionally should be tested under the traditional equal protection standards." (Emphasis supplied.)

This holding is directly supported in the cases of Kirk v. Board of Regents of University of California, *supra;* Landwehr v. Regents of University of Colorado, *supra;* Clarke v. Redeker, 259 F. Supp. 117 (S. D. Iowa, 1966), affirmed, 406 F. 2d 883 (8th Cir., 1969), cert. denied 396 U. S. 862, 90 S. Ct. 135, 24 L. Ed. 2d 115; American Commuters Assn., Inc. v. Levitt, 279 F. Supp. 40 (S.D.N.Y., 1967), affirmed, 405 F. 2d 1148 (2d Cir., 1969).

At this point it is clear that: (1) The state has the power to classify students on the basis of residency for the purpose of charging tuition, and (2) to enforce such a classification a state has the power to define a resident for purposes of tuition differently than a resident for other purposes.

The rigid requirements of the "Constitutional Right versus Compelling State Interest" test not being applicable, we narrow the problem to an examination of whether the Nebraska requirement of 4 months continuous residency independent of school attendance,

meets traditional equal protection standards. The test becomes, then, whether a reasonable basis for classification exists that is related to a legitimate objective of the state. Harper v. Virginia State Board of Elections, 383 U. S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369; Creigh v. Larson, 171 Neb. 317, 106 N. W. 2d 187.

Refined analysis and simplistic logic when applied to the practical impact of a particular classification produces many times an appearance of inequality and discrimination. This is especially true close to the borderlines. But the sharpness of the lines drawn does not create an irrationality of classification or an invidious discrimination. This is particularly true when the sword of legislative policy deals with broad problems of economics and social welfare.

Very recently (1970) in upholding a family maximum versus an ascertained need per individual welfare payment provision, the United State Supreme Court said in Dandridge v. Williams, *supra,* as follows: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the *classification has some 'reasonable basis,'* it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 S. Ct. 337. *'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical,* it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago,* 228 U. S. 61, 69-70, 57 L. Ed. 730, 734, 33 S. Ct. 441. *'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'* McGowan v. Maryland, 336 U. S. 420, 426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101." (Emphasis supplied.)

In classifying students for the purpose of charging tuition, the state had the legitimate objective of attempting to achieve a partial cost equalization between those persons who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state. Such an objective is clearly a "reasonable justification" for the discrimination in tuition. Landwehr v. Regents of University of Colorado, *supra;* Clarke v. Redeker, *supra;* Kirk v. Board of Regents of University of California, *supra;* Starns v. Malkerson, *supra;* American Commuters Assn., Inc. v. Levitt, *supra.*

Starns, recently affirmed by the United States Supreme Court, relies on Clarke v. Redeker, *supra,* a 1966 case, and quotes the holding there as follows: "Although there is no way for this Court to determine the degree to which the higher tuition charge equalizes the educational costs of residents and nonresidents, it appears to be a reasonable attempt to achieve a partial cost equalization. The regulation classifying students as resident or nonresident for tuition purposes is not arbitrary or unreasonable and bears a rational relation to Iowa's object and purpose of financing, operating and maintaining its educational institutions."

In Kirk v. Board of Regents of University of California, *supra,* again relied upon in the affirmed Starns case, the California court said: "This state has a valid interest in providing tuition-free education to those who have demonstrated by a year's residence a *bona fide intention of remaining here and who,* by reason of that education, will be prepared to make a greater contribution to the state's economy and future. Accordingly, we hold that the regulation classifying students as residents or nonresidents for tuition purposes *is not arbitrary or unreasonable and bears a rational limitation to California's objective* and purpose of financing, operating and maintaining its many publicly financed educational institutions of higher learning." (Emphasis supplied.)

An examination of the settled law and the authorities reveals a clear path to our decision. The federal and state courts have sustained full 1-year residency requirements for tuition purposes in Colorado, California, Iowa, New York, and Minnesota (Starns affirmed by the United States Supreme Court). Nebraska only requires 4 months of continuous residency independent of school attendance. Both aspects of the statute bear a reasonable relation to a legitimate state objective. They neither penalize nor infringe on a basic constitutional right. Since this is true, the Legislature may reasonably require that the bona fides of the residence be demonstrated independent of the equivocal nature of mere physical attendance by a nonresident at a school in the state. The requirement of 4 months is surely not so burdensome as to forever bar the establishment of residence for other purposes. In fact, it prohibits not at all the establishment of legal residence for other purposes, primarily a matter of intention. Putting it another way, if a state may adopt such a standard or classification, it may also adopt and require reasonable standards to ascertain and enforce the basic legitimate state purpose.

Most students coming to Nebraska soon before registration come here primarily to attend the university. See, Kirk v. Board of Regents of University of California, *supra;* Clarke v. Redeker, *supra;* Starns v. Malkerson, *supra.* Voting, physical presence, acquisition of housing, or payment of taxes may or may not be indicative of the establishment of a legal residence, which is primarily a question of intent. The acquisition of these various indicia, coupled with an actual residence requirement of 4 months in the state while not attending school, obviously comes much closer to proving the bona fides of intent. The Nebraska statute is reasonably designed to protect a legitimate state interest and to secure the bona fides of the claimed intent regarding the residence of a person coming from another state for

the avowed and immediate purpose of securing the educational facilities of this state and eschewing the facilities of the state of his prior residence.

It may be that the statutory standard is occasionally imprecise and imperfect in its application to the relatively unique circumstances of a particular case, such as is claimed for the plaintiff here. However, as we have seen, this cannot be used as the basis for striking down the tuition classification here. A state is not required by the equal protection clause to choose between attacking every aspect of a problem or making no effort at all. It is enough if the regulation has a rational basis and does not invidiously discriminate. Dandridge v. Williams, *supra.* The last sentence of section 85-502, R. R. S. 1943, and the whole statute in its entirety meet that test.

Finally, we do not think that section 85-502, R. R. S. 1943, deprives the plaintiff of due process of law. The Legislature had the power to act on the subject matter; the power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner; and the section, being definite, has a reasonable relationship to a proper legislative purpose, that is, to distribute more evenly the cost of operating and supporting the state educational institutions between residents and nonresidents attending those institutions. As such, the section is not in conflict with due process of law. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548 (1947), cert. denied, 335 U. S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948); Kirk v. Board of Regents of University of California, *supra;* Starns v. Malkerson, *supra;* Clarke v. Redeker, *supra;* Dandridge v. Williams, *supra;* McGowan v. Maryland, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393.

We therefore hold that section 85-502, R. R. S. 1943, is a valid exercise of legislative power to classify, does not infringe upon rights protected by Article I, section 1 or 3, of the Constitution of the State of Nebraska, or the

Fourteenth Amendment to the Constitution of the United States, and is valid and constitutional.

Various other contentions of plaintiff herein are tangential aspects of the fundamental attacks discussed in this opinion. We have examined all of these contentions and find them to be without merit.

The judgment is reversed and the cause remanded to the district court with directions to enter judgment accordingly.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

The plaintiff, his wife, and children have been bona fide residents of, and domiciled in, Nebraska since September 5, 1967. Those facts are undisputed. It is conceded that a state may charge a nonresident a higher tuition fee than that charged a resident; and that the state may also impose an original durational residence and domicile requirement of at least a year upon those persons coming into the state from other places. Virtually all of the cases cited in the majority opinion support those two undisputed propositions.

The critical part of the statute, which is not fully quoted in the majority opinion, provides: "No person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state, except in the case of a minor who qualifies as provided in this section."

There is no rational or reasonable basis on which an individual who has been a bona fide resident of and domiciled in this state for the initial time period required by statute, should be denied the right to prove that fact simply because he was in attendance at "any institution of learning in this state," whatever that term connotes. The discrimination is compounded when minors, emancipated and unemancipated, are excepted. The applicable principles are set out in Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675. In that

case, the Supreme Court overthrew a Texas constitutional provision prohibiting any member of the armed forces of the United States from acquiring a voting residence in the State of Texas so long as he remained in service, even though he might have fulfilled the initial residence requirements applicable to others. There is surely no more justification for arbitrary discrimination against students than against persons in military service, nor is there any more rational basis for it. As applied to a tuition case of this kind, see Newman v. Graham, 82 Idaho 90, 349 P. 2d 716, 83 A. L. R. 2d 492.

The 1971 Legislature recognized the fact that there was no justifiable or reasonable basis for such an arbitrary and invidious discrimination and completely amended section 85-502, R. R. S. 1943, and repealed the former section. L.B. 408 of the 1971 Legislative Session completely removed that part of the statute quoted above and found unconstitutional by the district court; changed the initial residence requirement from four months to one year; completely redefined classifications; and set specific, complete, and objective requirements for proof of residence and domicile. That statute represents a thorough, rational, and reasonable approach to the problems involved.

The judgment of the district court was eminently correct and should have been affirmed.

MERVIN D. EVANS, APPELLEE, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, NEBRASKA, ET AL., APPELLEES, IMPLEADED WITH CITY OF OMAHA ET AL., APPELLANTS.
188 N. W. 2d 851

Filed July 23, 1971. No. 37767.

1. **Statutes: Constitutional Law.** In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality.
2. ———: ———. If a statute is subject to more than one con-

struction, one of which would make that act constitutional and the other unconstitutional, this court is required to adopt the former.

3. **Statutes: Constitutional Law: Evidence.** The burden of establishing the unconstitutionality of a statute is on one attacking its validity, because statutes are presumed to be constitutional and unconstitutionality must be clearly established.
4. **Statutes.** If the words of a statute are of doubtful meaning they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it.
5. **Statutes: Constitutional Law: Legislature: Taxation: Powers: Utilities.** In order to find a provision of the state Constitution restricts the plenary power of the Legislature to tax the Metropolitan Utilities District, the language of the restriction must be clearly applicable.
6. **Legislature: Powers: Utilities.** A public corporation authorized by the Legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people is an arm or branch of the government for this purpose and under the plenary control of the Legislature.
7. **Constitutional Law: Legislature: Powers: Taxation.** The state Constitution is not a grant but rather is a restriction of legislative power. The taxing power vested in the Legislature is without limit except as it may be prescribed by the Constitution itself. Consequently, courts can enforce only those limits which the Constitution clearly imposes.
8. ———: ———: ———: ———. In the proper construction of constitutional provisions, limitations or restrictions upon the power of taxation can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language.
9. **Constitutional Law: Municipal Corporations: Words and Phrases.** "Municipal corporations," as that term is used in Article VIII, section 7, Constitution of Nebraska, refers to municipal corporations in the strict and legal sense of those which exercise governmental functions, as distinguished from proprietary functions.
10. **Statutes: Constitutional Law.** Legislative Bill 425 (Laws 1967, c. 47, p. 178) determined to be constitutional.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Herbert M. Fitle, Schmid, Ford, Snow & Mooney, Manfred Pieck, and John E. Rice, for appellants.

Cecil S. Brubaker, W. L. Strong, and Merlin E. Remmenga, for appellee Metropolitan Utilities Dist.

Foulks, Wall & Wintroub, for appellee Evans.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This appeal is from the sustaining of the motion of Metropolitan Utilities District of Omaha, hereinafter referred to as MUD, for summary judgment determining LB 425 (Laws 1967, c. 47, p. 178), to be invalid and unconstitutional. The original action was brought by plaintiff Evans as a ratepayer of MUD for a declaratory judgment of the constitutionality of LB 425, which bill amended section 14-1041, R. R. S. 1943, and created section 14-1042, R. R. S. 1943. For the purposes of this opinion LB 425 will be used to refer to the above sections. LB 425 requires MUD to pay 2 percent of its gross retail sales to the municipalities which it serves.

The City of Omaha, hereinafter referred to as City, demurred to the petition of plaintiff Evans, which demurrer was sustained in the trial court and affirmed on appeal to this court. See Evans v. Metropolitan Utilities Dist., 184 Neb. 172, 166 N. W. 2d 411. The case then proceeded on the cross-petition of MUD, which asked for a declaration of the unconstitutionality of LB 425 and for an injunction as to future payments thereunder. The defendant City filed an answer to the cross-petition of MUD, asserting the constitutionality of LB 425 and setting forth affirmative defenses of ownership, waiver, estoppel, and laches. The district court found LB 425 to be unconstitutional as violative of Article I, section 3, and Article VIII, sections 1 and 7, of the Constitution of Nebraska, as well as of the Fifth Amendment to the

Constitution of the United States. We determine LB 425 to be constitutional, and reverse.

In 1911 City purchased the Omaha Water Company. In 1913 the Legislature created the Metropolitan Water District of the City of Omaha, and gave it the sole management and control of all waterworks systems in Omaha and adjacent areas. See § 14-1001, R. R. S. 1943. Between 1918 and 1920, City acquired a gas plant by condemnation. In 1921 the Legislature extended the powers of the Metropolitan Water District to include the gas plant acquired by City, and changed the name of the Metropolitan Water District to Metropolitan Utilities District. See § 14-1103, R. R. S. 1943. Since that time, although City has never been reimbursed for expenditures made to purchase and improve the waterworks systems or the gas plant, they have been controlled, managed, and operated by Metropolitan Utilities District.

In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality. Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729. If a statute is subject to more than one construction, one of which would make that act constitutional and the other unconstitutional, this court is required to adopt the former. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. In construing a statute, the court must look to the objective to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on it a reasonable construction which will best effect its purpose, rather than one which will defeat it. City of Grand Island v. Ehlers, 180 Neb. 331, 142 N. W. 2d 770. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity, because statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass upon a question of constitutionality unless it becomes necessary to do so. If the words of a statute are

of doubtful meaning they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397.

MUD was created by the Legislature and given the control and management of the water and gas plants owned by City. As we have said on many occasions, the Legislature has plenary power over MUD. "Plenary" is defined in Black's Law Dictionary (4th Ed.), p. 1313, as: "Full, entire, complete, absolute, perfect, unqualified." The Legislature which created MUD could likewise destroy it by transferring its operation to some other public body.

The district court felt that LB 425 was violative of the following portion of Article VIII, section 1, Constitution of Nebraska: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." We assume the rationale of the court to be that inasmuch as the Constitution says the necessary revenue for governmental subdivisions shall be raised by taxation, either that the payments required to be made by MUD must be considered to be tax payments, or if not tax payments, they could not be required. There is no merit to either of these contentions. As suggested hereafter, we determine the payments are not tax payments. It is quite apparent under the Nebraska Constitution that the state, as well as any of its political subdivisions, does not raise all of its revenue by means of taxation. What the Constitution says is the "necessary revenue," which would be revenue other than that acquired from other sources. There are many other sources of revenue, such as licenses; permits; fees and franchises; money from loans and bond issues; state and federal grants in aid; income from the use, lease, and sale of property; as well as others.

In 1947 the Legislature enacted LB 58 (Laws 1947, c.

21, p. 111), which became a part of section 14-1041, R. R. S. 1943, and which provided for the payment by MUD to City of a sum equal to 1 percent of the book value after deduction of the depreciation of the plant and distribution system in service within the corporate limits of City, such payments to be in lieu of any license, occupation, or excise tax upon MUD.

LB 425 amended section 14-1041, R. R. S. 1943, to provide that MUD shall pay City a sum equivalent to 2 percent of the annual gross revenue derived from all retail sales of water and gas sold within City, but retained the prohibition on City from levying or collecting any license, occupation, or excise tax upon or from MUD. This same provision was extended to all other municipalities in which MUD operates.

The title of LB 425 was as follows: "An Act to amend section 14-1041, Reissue Revised Statutes of Nebraska, 1943, relating to cities of the metropolitan class; to change the amount metropolitan water and utilities districts shall pay to the metropolitan cities in lieu of license, occupation or excise tax; to provide for such payments to other municipalities as prescribed; and to repeal the original section."

MUD never questioned LB 58 and made all payments required thereunder until the amendment of section 14-1041, R. R. S. 1943, by LB 425. It is evident that the Legislature in requiring the payment to City and the other municipalities involved did not consider the payments as a tax but rather as a payment in the nature of a license, an occupation fee, or an excise tax. In this connection, it is important to note that in State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67, we held constitutional provisions relating to property taxes do not apply to excise taxes and a gasoline tax being an excise tax was not in contravention of the inhibition of Article VIII, section 7, Constitution of Nebraska.

The legislative committee statement on LB 425 states that its purpose is to increase the amount MUD now

pays to the City of Omaha; that the original bill provided for a 4½ percent payment of the annual gross revenue derived from all retail sales of gas sold within City; and that by virtue of a compromise effected between MUD and the Omaha city officials, the bill was revised to add gross revenue derived from retail sales of water, and to reduce the percentage to 2 percent of the annual gross revenue.

Article I, section 3, Constitution of Nebraska, is as follows: "No person shall be deprived of life, liberty, or property, without due process of law." This is the same point which is involved in the reference to the Fifth Amendment to the Constitution of the United States. A sufficient answer to the due process objection is embraced in the following from Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548: "As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the Legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C. J. S., Constitutional Law, § 569, p. 1156."

We are dealing with a public service corporation created by the Legislature over which the Legislature has plenary power. "The rights and franchises of a public corporation never become vested rights as against the state, and its charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated." United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576.

If we accept the premise of MUD that LB 425 is a tax, it is still necessary for MUD to point out the express language prohibiting the Legislature from providing it. In order for the state Constitution to restrict the plenary power of the Legislature to tax MUD, the language of the restriction must be clearly applicable. R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N. W. 2d 746.

In Consumers Public Power Dist. v. City of Lincoln, 168 Neb. 183, 95 N. W. 2d 357, we said: "* * * the rule is clear in this state that a public corporation is not subject to taxation * * * *unless the power to tax is expressly conferred by the Legislature which has plenary power over it.*" (Italics supplied.) Here, even if we were to accept MUD's contention that we are dealing with a tax, it would be a tax levied by the Legislature on a public as distinguished from a municipal corporation. MUD, being the creation of the Legislature, may be taxed or even destroyed by the Legislature.

In United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576, we said: "A public corporation, authorized by the Legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the Legislature * * *." In that case, we determined that the Legislature, having plenary power over public corporations, could authorize contributions for public purposes. We said: "While the revenues received by the district in the operations of its business are not public funds in the same sense as those derived from taxation, however, they are public funds collected by the district for certain purposes and the Legislature may, under its control of the district, authorize their expenditure for a public purpose beneficial to such district and those immediately interested therein, but

under the restrictions and limitations imposed on the Legislature by the Constitution."

It is important to remember that the state Constitution is not a grant but rather is a restriction of legislative power. The taxing power vested in the Legislature is without limit, except as it may be prescribed by the Constitution itself. State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67. Consequently, courts can enforce only those limitations which the Constitution itself clearly imposes. Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772. In the proper construction of constitutional provisions, limitations or restrictions upon the power of taxation can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language. State v. Cheyenne County, *supra*.

The following from United Community Services v. The Omaha Nat. Bank, *supra*, is of interest herein: "As stated in Oxnard Beet Sugar Co. v. State, supra: 'It is the province of the legislature to determine matters of policy. In appropriating the public funds, if there is a reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the legislature; * * *.'"

The Metropolitan Utilities District often has been referred to as a municipal corporation. More accurately it is merely a public agency or public service corporation created to perform purely proprietary functions in the operation of specific public utilities. The distinction is fully delineated in State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67, as follows: "In Bliss v. Pathfinder Irrigation District, 122 Neb. 203, this court, in discussing the essential difference between a public corporation and a municipal corporation, made the following observations: 'Corporations are generally classed as public and private. While a municipality is a public corporation, it does not

follow that every public corporation is a municipality. In 1 Dillon, Municipal Corporations (5th ed.) 58, sec. 31, the term "municipal corporation" is defined as follows: "A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." A like definition is found in 43 C. J. 65.'

"The definition in 43 C. J. 65, thus referred to with approval, is as follows: 'A municipal corporation is a legal institution formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate with corporate name and continuous succession and for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state. The foregoing definition presents the logical and practical view of a municipal corporation. It is a brief formula embracing the essential elements and excluding other kindred bodies called quasi corporations. It expressly includes: The body of individuals; the sanction of the sovereign; the definite public purpose; the necessary powers; the charter; and the primary incidents of name and succession. *These are the elements generally recognized as essential to a municipal corporation.* It impliedly excludes parishes, counties, townships, and districts, which are almost municipalities and yet are deficient in some of the essential attributes of a municipal corporation; while it expresses the complex nature of the corporation, whereby it acts as a municipium, and also as a local agency for administering and enforcing the laws of the state.'

"This approved and accepted definition excludes counties from the scope of the term 'municipal corporations,' as employed in section 7, art. VIII of the Constitution, which conclusion is reinforced by the conceded fact that, in Nebraska, 'a county does not possess the double governmental and private character that cities do' (State v. Board of County Commissioners, supra), which is one of the essential attributes of a municipal corporation. It therefore follows that, viewing the constitutional provision under consideration as a limitation of or exemption to the sovereign power of taxation, and giving the term 'municipal corporations' employed therein a fair, reasonable interpretation in the light of the principle that such restriction or limitation can never be raised by implication but the intention to impose them must be expressed in clear, unambiguous language, counties are not embraced therein, are not municipal corporations, and are not entitled to the benefits of the restriction and limitation provided by section 7, art. VIII of the Constitution. See City of Ardmore v. State, 32 Pac. (2d) (Okla.) 728." (Emphasis supplied.)

As the above quotation indicates, a municipal corporation historically and in the strict sense is a political subdivision, organized to exercise governmental powers specifically conferred upon it by the state. MUD exercises no strictly governmental functions. Metropolitan Water District was established in 1913. In March of that year this court filed Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. N. S. 174, involving an action for injuries received in the operation of the Lincoln water works. That case held: "It is no part of the duty of a municipal corporation to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is entirely voluntary on its part, and, while engaging in such business, it is acting in a purely private business capacity, outside of its functions and duties as a municipal

corporation, and is bound by all of the rules of law and procedure applicable to any other corporation or person engaged in a like enterprise." See, also, Cook v. City of Beatrice, 114 Neb. 305, 207 N. W. 518, which, citing the above quotation from Henry v. City of Lincoln, *supra*, held that Beatrice, in maintaining an electric plant and selling current, was outside its governmental functions.

We have heretofore determined that MUD exercises no governmental functions. Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858. We there held: "The construction, operation or maintenance of water and gas plants by municipal corporations is not an exercise of governmental functions, but is rather in the nature of a private enterprise for the convenience, advantage or benefit of the municipality, its inhabitants and property owners."

In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558, we said that where the Legislature creates a separate municipal corporation to perform the functions of a city usually regarded as proprietary, such municipal agency is just as much engaged in a proprietary function as if the city were doing it itself.

We interpret the term "municipal corporations," as used in Article VIII, section 7, Constitution of Nebraska, to refer to municipal corporations in the strict and legal sense or those which exercise governmental functions as distinguished from proprietary functions. MUD is a public service corporation exercising only proprietary functions and is not included within the meaning of municipal corporations as that term is used in the Constitution.

MUD has not sustained the burden of proving LB 425 to be unconstitutional. The judgment of the district court sustaining the motion for summary judgment is reversed and the cause is remanded with directions to

dismiss the cross-petiton of MUD.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I do not agree that the charge imposed by section 14-1041, R. R. S. 1943, upon the gross revenue of the Metropolitan Utilities District of Omaha is not a tax. It is clearly a revenue measure. To classify it as something other than a tax is to ignore reality and exalt form over substance.

In a number of cases this court has recognized that the Metropolitan Utilities District of Omaha is a municipal corporation in the broader sense of the term. See, Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558; Keystone Investment Co. v. Metropolitan Utilities Dist., 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507; Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397. The Metropolitan Utilities District performs the functions, both governmental and proprietary, that otherwise would be performed by the City of Omaha in regard to a water and gas system. The district has all the powers granted to cities and villages by the general statutes for the construction or extension of waterworks and other utilities. The district fixes all rates including those for services furnished by a private utility, and its rules and regulations have the force and effect of a city ordinance.

The Constitution provides that: "* * * The Legislature shall not impose taxes on municipal corporations, or the inhabitants or property thereof, for corporate purposes." Art. VIII, § 7, Constitution of Nebraska. Such a provision is generally construed to mean that the Legislature has no power to impose a tax for the ordinary purposes for which taxes are levied by municipalities. 16 McQuillin, Municipal Corporations (3d Ed.), § 44.18, p. 58: Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858; 62 C. J. S., Municipal Corporations, § 194, p. 352.

By section 14-1041, R. R. S. 1943, the Legislature has imposed a tax on one municipal corporation for the benefit of another with no restriction upon the use of the revenue. The statute compels a diversion of utility revenue for non-utility purposes. Its effect is to impose a levy for city purposes upon the ratepayers of the district without regard to their place of residence.

WHITE, C. J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. RUDOLPH KLATT, APPELLANT.
188 N. W. 2d 821

Filed July 23, 1971. No. 37850.

1. **Statutes: Criminal Law: Incompetent Persons: Trial.** Under the provisions of section 29-1823, R. S. Supp., 1969, a determination that an accused is mentally incompetent to stand trial is effective as of the date of the determination and operates to suspend criminal proceedings until the disability is removed. It does not invalidate prior proceedings nor constitute a finding or determination that the accused was insane or incompetent to stand trial or assist in his own defense at any prior time.
2. **Evidence: Criminal Law: Incompetent Persons: Trial.** A defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence that the defendant was sane at the time of the crime beyond a reasonable doubt.
3. ———: ———: ———: ———. The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support the findings.
4. **Evidence: Criminal Law: Incompetent Persons: Trial: Appeal and Error.** The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal.
5. **Venue: Criminal Law: Incompetent Persons: Trial: Appeal and Error.** A motion for change of venue in a criminal case is ad-

dressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of such discretion is shown.

Appeal from the district court for Custer County: WILLIAM F. MANASIL, Judge. Affirmed.

Thomas L. Anderson and Leo F. Clinch, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant, Rudolph Klatt, was charged with murder in the first degree. He waived trial by jury and the case was tried to the court. He was found guilty of murder in the second degree and sentenced to life imprisonment. All issues on appeal involve factual and legal determinations as to the defendant's sanity. We affirm the conviction and sentence.

Some background facts, as well as a summary of the expert testimony on the issue of sanity, may be useful. On Saturday evening, April 29, 1967, at about 10 p.m., the defendant and his favorite half-brother had engaged in a public altercation and scuffle outside a tavern in Anselmo, Nebraska. The defendant left the scene of the scuffle and went to Broken Bow with a woman companion. The half-brother and his wife returned to their rural home near Anselmo and went to bed. They were awakened at about 5 a.m. the next morning by the defendant knocking on their door. Both the half-brother and his wife went to the door. The defendant had a shotgun with him. The brothers engaged in a brief conversation. The defendant started to walk away, then turned and shot his half-brother and killed him. He was arrested some 4 or 5 hours later while eating breakfast in a restaurant in a nearby village.

The evidence was extremely contradictory as to the

extent of the defendant's drinking and intoxication during the entire weekend in which the shooting occurred. The only witness who testified that the defendant was intoxicated at any time close to the time of the murder was his woman companion, who testified at the trial that he was intoxicated at 2 a.m. the morning of the shooting. Several witnesses testified as to the defendant's activities on the evening before, or from the time of the actual shooting to the time of his arrest a few hours later. All of them testified that the defendant did not appear to be intoxicated.

The defendant had been in and out of mental hospitals on several occasions between early 1963 and the fall of 1966. Most of these occasions involved alcoholism. On at least some of the occasions, the doctors noted either schizophrenic tendencies or a paranoid state.

The record of criminal proceedings involving the defendant spanning the period from the spring of 1963 to November of 1966, reveals charges varying from menacing threat, to shooting with intent to kill, interspersed with intoxication, and driving offenses involving intoxication or suspension of driver's license.

Following the defendant's arrest on the morning of April 30, 1967, he was charged with first degree murder. On May 5, 1967, a preliminary hearing was held at which time the defendant was represented by counsel employed by him. He was bound over to the district court and on May 11, 1967, he was arraigned in the district court with his attorney present. The defendant stood mute and the court entered a plea of not guilty. In August of 1967, upon applications both by the defendant and by the State, the court ordered the defendant transferred to Omaha, Nebraska, for psychiatric examination. In Omaha, he was examined by Dr. J. Whitney Kelley and Dr. William F. Giles, psychiatrists; and Dr. Donald Fauth, a psychologist, conducted certain psychological testing.

On October 24, 1967, following the reports of the psy-

chiatrists and their answers to interrogatories submitted by the court, the district court entered an order finding that the defendant was presently incompetent and incapable of standing trial for the charge of murder. The court ordered that further proceedings be deferred and committed the defendant to the State Hospital in Lincoln, Nebraska.

On October 28, 1969, after more than 2 years treatment in the Lincoln State Hospital, two psychiatrists, one of them the acting clinical director of the hospital, advised the district court that the symptoms of whatever psychosis the defendant showed at the time of admission had been in remission for at least 12 months. In answer to specific interrogatories, the two psychiatrists by affidavit certified that the defendant understood the nature and object of the proceedings against him and the possible sentences if convicted. They also certified that he was mentally competent to consult and confer with and aid counsel in a reasonable and rational manner in preparation for trial and at the trial itself. Counsel for the defendant was appointed on October 31, 1969. On December 30, 1969, the district court set March 10, 1970, as the trial date, and ordered the defendant transferred to the Penal and Correctional Complex. On February 13, 1970, the district court granted the request of defendant's counsel to have the defendant transferred to the Hall County jail in Grand Island, Nebraska, for the convenience of counsel in conferring with defendant in preparation for trial. In May 1970, the court overruled pleas in abatement based upon contentions that the defendant's preliminary hearing and arraignment in 1967 were invalid because of the defendant's alleged mental incompetence at that time. A motion for a change of venue was also overruled and thereafter the defendant waived the right to a jury trial. After continuances, the case ultimately was tried to the court without a jury commencing on July 27, 1970, and concluding July 31, 1970.

There was no question but that the defendant shot and killed his half-brother. The only real issues involve his legal responsibility for that act and his mental competence to stand trial. Therefore, we must briefly review the testimony with respect to the defendant's mental condition. Dr. Kelley and Dr. Giles, the psychiatrists who had examined the defendant in September of 1967, testified for the defendant. Based upon the results of Dr. Fauth's psychological testing and their own examinations, they were both of the opinion that the defendant was a chronic paranoid schizophrenic. In their opinions also, he was unable to distinguish between right and wrong at the time of the homicide and was not legally responsible for his acts because of mental illness. They also both felt that drinking would aggravate his condition and that his chances of cure were rather remote. Neither of them had seen the defendant between the time of their examinations in September of 1967 and the time of trial in July of 1970, although they had reviewed his hospital and testing records. Dr. Giles testified that he had not reexamined the defendant, did not have knowledge of his current condition, and, therefore, could give no opinion as to how he was at the time of trial.

Dr. Leonard Woytassek, clinical director of the Lincoln State Hospital, testified for the State. It should be noted here that Dr. Woytassek had first examined the defendant in September of 1965, when the defendant had been committed to the hospital for treatment. At that time, Dr. Woytassek determined that during drinking episodes, the defendant might develop periods of psychosis but that he was not generally psychotic at that time. Dr. Woytassek also had supervised the defendant's treatment for more than 2 years following the commitment in the fall of 1967. He testified that the conclusion of the hospital staff in February 1968, was that the defendant was suffering from a schizophrenic reaction, paranoid type, at that time. He classified the

defendant's schizophrenia as mild. He also testified, in response to a hypothetical question which included a fair summary of all of the facts disclosed by the evidence, that in his opinion the defendant was mentally capable of knowing and understanding his actions and of distinguishing between right and wrong on April 30, 1967. Dr. Woytassek agreed that if the defendant had consumed a substantial amount of alcohol, it would interfere with his ability to know right from wrong and his ability to understand what he was doing.

The defendant contends that the preliminary hearing and arraignment in 1967 were invalid. That contention assumes that the court order of October 1967, finding the defendant mentally incompetent to stand trial at that time, was also final and retroactive, and made all prior proceedings invalid. It is also argued that the opinions of the two psychiatrists which formed the foundation for that order conclusively established the defendant's insanity for all purposes, both at the time of the commission of the crime and thereafter.

It is essential at this point to note that mental unsoundness in a person accused of crime may give rise to two entirely distinct legal problems. One involves the responsibility of the defendant to be punished, which is determined under the legal test of responsibility. The other involves the defendant's mental condition, not at the time of the act charged, but at the time of the criminal proceedings—whether he is presently sane enough to plead or be tried. The tests of responsibility—capacity to know right from wrong, are not the tests which are applied in determining competency to plead or stand trial. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense. See Weihofen, "Mental Disorder as a Criminal Defense," C. 9, pp. 429 to 431.

Under our statutes, a determination of competence to plead or stand trial is made by the court under the provisions of section 29-1823, R. S. Supp., 1969. That procedure was followed here. The section provides in part: "If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial * * *. The judge of the district court * * * shall have the authority to determine whether or not the accused is competent to stand trial. * * * Should he determine after a hearing that the accused is mentally incompetent to stand trial he shall order the accused to be committed to a state hospital for the mentally ill until such time as the disability may be removed."

The effect of that statute is simply to suspend criminal proceedings during the time an accused is determined by the court to be mentally incompetent to stand trial. The statute neither validates nor invalidates any prior proceedings, nor does the determination of incompetency to stand trial operate retroactively. The court clearly has authority to terminate the suspension in its sound discretion by the same method of factual determination. See State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766.

In this case, defendant's counsel in 1970, prior to trial, obtained a complete transcript of the preliminary hearing held in 1967. At the arraignment held in 1967, the defendant stood mute and a plea of not guilty was entered. Under such circumstances, we find no possibility of prejudice to the defendant's rights. It should be noted too that the affidavits of the two psychiatrists from the Lincoln State Hospital in November of 1969, that the defendant was then competent to stand trial stand uncontraverted. Neither was there any affirmative evidence that the defendant was not competent to stand trial nor assist in his own defense in 1970. In the absence of a showing of the invalidity of the psychiatrists' certificates, the court was required to proceed with the trial in the suspended criminal proceedings.

Under the provisions of section 29-1823, R. S. Supp.,

1969, a determination that an accused is mentally incompetent to stand trial is effective as of the date of the determination and operates to suspend criminal proceedings until the disability is removed. It does not invalidate prior proceedings nor constitute a finding or determination that the accused was insane or incompetent to stand trial or assist in his own defense at any prior time. The pleas in abatement were properly overruled.

The vital question in this case is whether or not the State sustained its burden of establishing that the defendant was sane at the time of the commission of the crime. In this state, a defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence that the defendant was sane at the time of the crime beyond a reasonable doubt. See Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267.

The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support the findings. See State v. Newson, 183 Neb. 750, 164 N. W. 2d 211. The issue here is whether there was sufficient evidence to support the verdict of the court sitting in place of a jury. The rule in this jurisdiction is that the primary test is the capacity of the defendant to distinguish between right and wrong at the time of the commission of the offense. The testimony of the psychiatrists in this case was directly contradictory on that issue. So was the evidence as to whether or not the defendant was intoxicated. The testimony of witnesses to the crime itself, as well as to the defendant's appearance and conduct before and after the actual time of the murder, gave the court, sitting as a jury, the opportunity to relate that testimony to the experts' testimony that was given in the case. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial

is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. See State v. Newson, *supra*.

The defendant also contends that his motion for a change of venue was improperly denied, and it is asserted that the defendant waived a jury trial as a result of the denial of that motion. The evidence was not convincing that the defendant was unable to obtain a fair trial in Custer County. It should be noted also that trial was finally held more than 3 years after the crime was committed. In any event, the defendant waived a jury trial, and under those circumstances, a refusal to grant a change of venue would not be prejudicial. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of such discretion is shown. State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775.

The remaining assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

JACK WEBBER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
188 N. W. 2d 214

Filed July 23, 1971. No. 37858.

1. **Annexation: Statutes: Municipal Corporations.** Under section 16-117, R. R. S. 1943, a city of the first class may annex contiguous lands which are urban or suburban in character and which are not agricultural lands rural in character.
2. **Statutes: Municipal Corporations: Ordinances.** Section 16-317, R. R. S. 1943, does not require that the minutes of the meeting of a city council embody the full text of an ordinance enacted thereat, but it is sufficient if the minutes set forth fully the

proceedings thereon showing that statutory requirements were complied with and the ordinance is sufficiently identified therein and is preserved in a volume or file separate from the minutes.

3. **Annexation: Statutes: Municipal Corporations.** The power of a city to annex lands contiguous to the city and which are within the boundaries of a rural fire protection district is not limited by the provisions of section 31-766, R. R. S. 1943.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Wright, Simmons, Hancock & Hall, for appellants.

Loren G. Olsson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action for a declaratory judgment to have an annexation ordinance of the City of Scottsbluff declared void. The land which is the subject of the annexation is a 43-acre tract owned by the plaintiffs. The date of passage and approval of the annexation ordinance was June 29, 1967. The district court found generally for the defendant City and dismissed the petition of the plaintiffs. The plaintiffs appeal. We affirm the judgment of the trial court.

The plaintiffs make the following claims: (1) The tract annexed was not urban or suburban in character but was agricultural and rural and was therefore not subject to annexation; (2) the annexation ordinance was not validly enacted nor was its enactment proved by competent evidence; and (3) the defendant City failed to comply with the provisions of section 31-766, R. R. S. 1943, relative to the change of boundaries of the City and the rural fire protection district in which the annexed territory was included and that the annexation was void for this reason. Some of these contentions involve subsidiary claims of error in the judgment of the trial court and these will be treated later in the opinion

in connection with the assignment of error to which they pertain.

The evidence shows that the tract in question is trapezoidal in shape but approaches a rectangle of the following approximate dimensions, to wit, 1,015 feet in width and about 1,500 feet in average depth. The record establishes that on the date of the passage and approval of the ordinance, the following uses existed: A shopping center occupied an area of 175 by 425 feet in the southwest corner of the property. The southeast corner was occupied by a large furniture store and a farm supply store with a separate office building for the supply store and a separate heating plant for the furniture store. Approximately two-thirds of the way northerly on the east boundary was a furniture warehouse. Near it and slightly further north was an empty caretaker's residence. In the northeast corner of the tract was the residence of the plaintiffs, an unused chicken house, a shelter for horses, and a barn. The owner kept three horses as a hobby and to show and to pull a wagon to make furniture deliveries as advertising for the store. The barn also housed furniture delivery trucks. North of the shopping center about one-third of the way along the west boundary of the tract was a small metal building, the use of which is not shown. On the tract was a 50,000-gallon water tower with well, well house, and water distribution system by means of which water was furnished to the buildings and businesses on the tract. The remainder of the 43 acres was unoccupied and pasture crop was raised thereon for the horses.

All the southern and eastern boundaries and the south approximately 1,400 feet of the western boundary were contiguous to existing city limits at the time of annexation. The tract was abutted on the south by a city street and on the west by a paved street or road for its full length. The area immediately south of the tract was commercially developed. The area immediately to the west was platted and developed residentially. On

the east side of the tract a strip 150 feet wide was occupied by a church and a National Guard armory. Further east were platted tracts used for ball diamonds, and still further east was a high school with accompanying facilities. Immediately to the north of the tract was a highway and beyond that a tract of land used for farming. Further to the northeast and north were platted residential areas partially developed but not included within the city limits. Also located to the north were medical offices and a site for a developing hospital. To the northwest and separated by undeveloped land were a hospital and an access street, both of which were included within the city limits.

City water mains were located adjacent to the tract. A city sewer crossed the tract from east to west about 730 feet from the southern boundary on an easement provided by the plaintiffs.

The record fully supports the implicit finding of the trial court that the tract in question was urban or suburban in character and not agricultural land rural in character. Plumfield Nurseries, Inc. v. Dodge County, 184 Neb. 346, 167 N. W. 2d 560; Voss v. City of Grand Island, 186 Neb. 232, 182 N. W. 2d 427; Sullivan v. City of Omaha, 183 Neb. 511, 162 N. W. 2d 227.

The plaintiffs contend the annexation ordinance was not validly enacted nor proved by competent evidence because the ordinance does not appear in toto in the minutes of the various meetings pertaining to its adoption.

The record shows that the annexation ordinance bears title as follows:

"An ordinance of the City of Scottsbluff, Nebraska finding that a certain tract of land situated in the Southeast Quarter (SE¼) of Section Fourteen (14), Township Twenty-two (22) North, Range Fifty-five (55) West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, contiguous and adjacent to the corporate limits of the City, is urban or suburban in character and not

agricultural land which is rural in character; re-annexing to, and re-including within the corporate limits of, the City such tract of land; providing that the inhabitants shall be entitled to the rights and privileges, and be subject to the laws, ordinances, rules and regulations of the City, and receive substantially the benefits as other inhabitants thereof; repealing ordinance No. 1555 and all conflicting ordinances and parts of ordinances but saving existing rights, claims, causes of action and defenses of the City; separating and saving provisions not declared invalid; and providing for recording and publication of the ordinance, and for its effective date."

The record, as evidenced by minutes duly certified by the city clerk, shows that at a meeting of the city council of the City of Scottsbluff on June 26, 1967, an ordinance, the title of which was as above set forth, was introduced by a member of the council. The minutes of that meeting further state: ". . . and the ordinance was fully and distinctly read. Thereupon Councilman Wallace moved that the ordinance be designated as Ordinance No. 1650, that the title thereof be approved and that the ordinance be made a part of the records in the office of the City Clerk, which motion was seconded by Councilman Thomas." The minutes then show that the vote on the motion was called and recorded and the motion was, by the mayor, declared to have been carried. Certified copies of minutes of the council of a meeting held on June 28, 1967, show the following: "Ordinance No. 1650, which had been fully and distinctly read at the regular meeting of the City Council held on June 26, 1967, was fully and distinctly read a second time."

Minutes of the meeting of the city council on June 29, 1967, show the following: "Councilman Kramer moved that the statutory rule requiring ordinances to be fully and distinctly read on three different days be dispensed with, in the case of Ordinance No. 1650, which motion was seconded by Councilman McKibbon. The

Yeas and Nays were called, the vote was as follows: 'YEAS' Thomas, Kramer, McKibbon, Wallace. 'NAYS' None. Absent: Donahue. The motion to suspend the statutory rule having been concurred in by three-fourths of all members elected to the Council, was, by the Mayor, declared to have carried.

"Whereupon Ordinance No. 1650 was read by title a third time. Councilman Wallace moved that the ordinance be passed as read, which motion was seconded by Councilman Thomas. The Mayor stated: 'The question is, "Shall Ordinance No. 1650 be passed and adopted?" ' The Yeas and Nays were called, and the vote was as follows: 'YEAS' Thomas, Kramer, McKibbon, Wallace. 'NAYS' None. Absent: Donahue.

"The passage and adoption of the ordinance having been concurred in by a majority of all members elected to the Council, the ordinance was, by the Mayor, declared passed and adopted; and the Mayor, in the presence of the Council, signed the ordinance, and the Clerk attested its passage and affixed his signature and the seal of the City thereto."

The record shows that the ordinance signed by the mayor and certified by the city clerk is the original ordinance which was filed in the office of the city clerk following the meeting of June 26, 1967. In the office of the city clerk the original of the ordinance is maintained and fastened in a special file or binder which is kept for the purpose and from which it may be removed by releasing the fastener in some way. In a separate set of ordinance volumes is kept and maintained a true copy of each ordinance, accompanied by a certificate of passage and publication executed by the city clerk and the original of an affidavit of publication by the printer. This is true of annexation ordinance No. 1650, as the record shows.

The plaintiffs contend that any ordinance is not validly enacted unless it is set forth in the minutes in full when introduced and each time it is read, that this is a re-

quirement of the Nebraska statutes and cases, and that minutes of the council so kept are the only acceptable proof of the enactment of the ordinance.

Section 16-317, R. R. S. 1943, provides in part: "The city clerk shall have the custody of all laws and ordinances, *and* shall keep a correct journal of the proceedings of the council." Section 18-1701, R. R. S. 1943, pertains to the matter of destruction of public records and contains this proviso: ". . . the provisions of this section shall not apply to the minutes of the clerk *and* the permanent ordinance and resolution books. . . ." (Emphasis supplied.)

Section 19-1102, R. R. S. 1943, provides in part: "It shall be the duty of every village or city clerk in every village or city having a population of not more than forty thousand to prepare and publish the official proceedings of the village or city board, council or commission within thirty days from any meetings of said board, council . . .." Section 16-405, R. R. S. 1943, provides for the publication of ordinances.

Section 16-403, R. R. S. 1943, provides for the proof of ordinances by the certificate under the seal of the city, for receipt in evidence of ordinances when published in book or pamphlet form purporting to be published by authority of the city; that passage, approval, and publication of an ordinance is proved by a certificate under the seal of the clerk; and that when ordinances are published in book or pamphlet form purportedly under the authority of the city council the same need not be otherwise published.

The opinion of this court is that the above statutes clearly contemplate the keeping of separate ordinance records apart from the minutes and do not require the embodiment of the whole of an ordinance in the council minutes. We hold the procedure followed by the City of Scottsbluff met the requirements of the statutes above referred to. This conclusion is supported by the following cases: Mayo v. Inhabitants of Town of West

Springfield, 260 Mass. 594, 157 N. E. 700; Pure Milk Producers & Distributors Assns. v. Morton, 276 Ky. 736, 125 S. W. 2d 216; Meacham Contracting Co. v. Kleiderer, 146 Ky. 441, 142 S. W. 720.

The following cases cited by the plaintiffs are not in point, to wit: Beverly Land Co v. City of South Sioux City, 117 Neb. 47, 219 N. W. 385 (involving failure to record the vote on the passage of an ordinance); Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78 (involving complete absence from the minutes of authorization of a contract); Barrett v. Hand, 158 Neb. 273, 63 N. W. 2d 185 (re modification of minutes by parol evidence); City of Valentine v. Valentine Motel, Inc., 176 Neb. 63, 125 N. W. 2d 98 (involving a nunc pro tunc attempt to supply by parol records of the passage of a resolution under section 17-407, R. R. S. 1943, and the calling and recording of the vote thereon).

The plaintiffs contend that section 16-117, R. R. S. 1943, which authorizes cities of the first class to annex contiguous territory, does not apply to cities such as Scottsbluff which have adopted the city manager plan. This contention is without merit.

Plaintiffs contend that the action of the council in the enactment of the ordinance was void because the city council was not properly elected and qualified; the city councilmen did not furnish proper bond; and that other city officials or employees, to wit, treasurer, clerk, and water commissioner were not validly holding the positions because not elected. We find these contentions to be without merit.

In June of 1965, the city council of the defendant City refused the request of the plaintiffs to zone the property as commercial. Plaintiffs contend that this estops the defendant City from annexing the tract. Plaintiffs cite no authority. We hold their contention in this respect is without merit.

Plaintiffs contend that annexation was improper and void because the benefits to be anticipated by annexa-

tion already existed and were available either by means furnished by plaintiffs themselves or by subdivisions of government other than the defendant City. This contention is without merit.

Plaintiffs contend that the city council of the defendant City had not taken action to implement the annexation by furnishing the benefits as required by law. The evidence does not sustain the contention. If it did the remedy of the plaintiffs would be other than by a declaration of the invalidity of the ordinance. See Plumfield Nurseries, Inc. v. Dodge County, *supra,* at p. 350.

The record discloses that the annexed tract was at the time of the adoption of the annexation ordinance within the boundaries of the Scottsbluff fire protection district and that section 31-766, R. R. S. 1943, had not been complied with. Plaintiffs contend that the annexation is not effective until this has been done. The language of section 31-766, R. R. S. 1943, clearly indicates that annexation is to be accomplished before compliance with section 31-766, R. R. S. 1943, is required. The validity of the council action in annexation in no way depends upon compliance with section 31-766, R. R. S. 1943. This court in effect so held in City of Bellevue v. Eastern Sarpy County S. F. P. Dist., 180 Neb. 340, 143 N. W. 2d 62.

The judgment of the trial court is affirmed.

AFFIRMED.

HIRAM SCOTT COLLEGE, A CORPORATION, ET AL., APPELLANTS, v. INSURANCE COMPANY OF NORTH AMERICA, APPELLEE.
188 N. W. 2d 688

Filed July 23, 1971. No. 37868.

1. **Insurance: Limitations of Actions: Statutes.** A fire insurance policy legally issued in this state which contains a provision requiring suit to be brought within 12 months after the inception of the loss, but which also contains provisions amending any

terms of the policy which are in conflict with state statutes to conform with such statutes, is subject to the limitations set out in section 44-357, R. R. S. 1943.

2. **Judgments: Evidence.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded for further proceedings.

Wright, Simmons, Hancock & Hall, for appellants.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This was an action by the insured to recover on an insurance policy furnishing multiple coverages, including property damage. The particular coverage involved was for direct damage caused by fire and lightning. The property involved was an electric motor which was an integral part of the air conditioning system in the library-science building of the plaintiff college, located in Scottsbluff, Nebraska. The district court sustained defendant's motion for summary judgment and the plaintiff has appealed.

The policy period was October 1, 1965, to October 1, 1968. On September 21, 1968, during an electrical storm, the air conditioning unit in the building ceased operation. On the following morning, when the air conditioning equipment was manually turned on, it would not operate. The college did not sustain a power outage on September 21, 1968, and the only short or blown fuses affected on that date were on the compressor of the air conditioning unit involved. The director of services of the college determined that the air conditioning

season was substantially completed; that the air conditioning equipment was serviced by a company in Denver, Colorado, and checked each spring before the air conditioning season; and determined that it was not necessary to have it serviced twice, under the circumstances.

The following spring, in May 1969, when the air conditioning unit was serviced, it was discovered that an electric motor which was an integral part of the air conditioning system had a hole blown between the phase windings. The only evidence of damage was on the interior of the motor and there was no damage to the windings or any discoloration. In the opinion of at least one expert, the damage was caused by lightning.

The service mechanics replaced the motor, beginning May 18, 1969, and the cost was $3,648.39. Notice of loss was given to the defendant 2 days later on May 20, 1969. The defendant had an electrical engineer examine the damage, but this was not done until September 19, 1969. On January 29, 1970, the defendant notified the plaintiff that an electrical engineer had examined the damage and, from the facts developed, the damage appeared to have been an electrical failure or maintenance problem rather than lightning. On that date, the defendant advised the plaintiff that the claim would not be honored. Plaintiff filed this action on February 27, 1970.

The defendant filed a motion for summary judgment on the ground that the action was not filed within a period of 1 year from the date of the alleged loss and there was no genuine issue as to any material fact "on this issue." Plaintiff filed a cross-motion for summary judgment. The district court granted defendant's motion for summary judgment and plaintiff appealed from that judgment and from the denial of its own motion for summary judgment.

The policy, under Section 5, Statutory Conditions, provided: "No suit * * * shall be sustainable * * * unless commenced within twelve months next after inception

of the loss." The defendant relies on that provision as applied in Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415.

The insurance policy here, however, contains two additional provisions not involved in the Rhodes case. In Section E, Conditions, subsection 10, is the following language: "If by the laws of the state within which this policy is issued it is invalid to require that suit on this policy be commenced within 12 months of loss, then any suit or action on this policy for the recovery of any claim shall be void unless such action, suit, or proceeding be commenced within the shortest limit of time permitted by the laws of such state."

The last page of the 21-page policy provides: "The terms of this policy and forms attached hereto which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

Section 44-357, R. R. S. 1943, provides: "No insurance company shall issue in this state any policy or contract of insurance containing * * * any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statutes of limitations of this state, unless otherwise prescribed by this chapter."

While there is no evidence here that the policy of insurance with which we are dealing is, or is not, the New York standard form, we must assume that it is. Since the New York standard form, as reflected in this policy, contains these provisions amending and conforming the policy to state statutes, the Legislature must have intended that such a policy would be subject to section 44-357, R. R. S. 1943, as well as to other conflicting provisions of our statutes. Any other interpretation of these multiple provisions would raise serious constitutional questions.

We therefore hold that a fire insurance policy legally issued in this state which contains a provision requiring

suit to be brought within 12 months after the inception of the loss, but which also contains provisions amending any terms of the policy which are in conflict with state statutes to conform with such statutes, is subject to the limitations set out in section 44-357, R. R. S. 1943.

Section 25-205, R. R. S. 1943, currently provides for a 5-year statute of limitations upon any agreement, contract, or promise in writing. The action here was brought well within the limitation period. Even if a 1-year statute of limitations were applicable, whether the facts here were sufficient to establish that the plaintiff knew, or reasonably should have known, of the loss prior to May 18, 1969, was at the least a material factual issue. The motion of the defendant for summary judgment should have been overruled.

The plaintiff on its appeal from the denial of its own motion for summary judgment contends that where both parties move for a summary judgment, the court is obligated to award summary judgment to one or the other. Plaintiff relies on Lesoing v. Dirks, 157 Neb. 183, 59 N. W. 2d 164. That case involved an interpretation of what constitutes good cause and is limited in its scope.

Section 25-1332, R. R. S. 1943, dealing with summary judgments, provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." That fundamental requisite is not present here. One of plaintiff's own exhibits, signed by a representative of defendant, reasonably demonstrates that one expert was of the opinion that the loss here was not caused by lightning nor within the coverage of the policy. The only admission by defendant was that "if the damage was caused by lightning, the policy covers the damage," except as to certain defenses. The cause of the loss was clearly material, and

there was a genuine conflict of fact as to that issue.

We cannot accept the proposition that if counsel for one party inadvertently or mistakenly moves for a summary judgment to which he is not entitled, the opposing party by filing a cross-motion, even though it is also unwarranted, may have the cross-motion granted simply because both parties have moved for summary judgment. Such technical procedural traps are unsupportable. The necessary foundational basis for any summary judgment is the absence of any genuine issue of material fact. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. To the extent that Lesoing v. Dirks, 157 Neb. 183, 59 N. W. 2d 164, is in conflict, it is overruled. The plaintiff's motion for summary judgment was properly overruled.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SMITH, J., concurring in part.

Plaintiffs attack the constitutionality of section 44-501, R. R. S. 1943. The section incorporates by reference the 1-year period of limitation of the New York standard fire insurance policy. Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415 (1966), motion for rehearing overruled, 180 Neb. 794, 146 N. W. 2d 66 (1966). The majority opinion reaches for the 5-year period prescribed by section 25-205, R. R. S. 1943. According to it, (1) the Rhodes case is distinguishable by two paragraphs of defendant's policy and (2) the statutory con-

struction justifiably allows the court to avoid the constitutional issues.

The two paragraphs of defendant's policy are immaterial in that they do not attempt to decrease the 1-year period. They or their equivalents are present is most policies written in Nebraska. They become a device for the majority opinion to inter the Rhodes case without an autopsy or certificate of cause of death.

I am puzzled by a rule of construction announced in the majority opinion. The rule comes to this: To avoid a decision on the constitutionality of section 44-501, R. R. S. 1943, to the extent that it prescribes the 1-year period, the court simply eliminates the language from the statute.

Construction and application of the 1-year period among the states have not been uniform. See, A. B. A., Section of Insurance, Negligence and Compensation Law, Annotation of the Fire Insurance Policy, 217 (1970); 3 Richards on Insurance, 1876 to 1879 (5th Ed., 1952). We ought not to compound problems by appearing to falter between the 1 and 5 year periods.

I concur that a genuine issue of material fact exists regarding the commencement of the 1-year period.

BOSLAUGH, J., concurring.

This action involved a "School-College Policy" which insured against multiple risks. Although the policy contained a 12-month limitation provision in Section I, Conditions, it also contained the additional provisions set out in the opinion of this court, one of which also is contained in Section I, Conditions, and the other in conditions applicable to the entire policy. It seems to me that the proper interpretation of the policy in suit is that the insurer waived the benefit of the 12-month limitation provision by inserting the additional provisions in the policy, and that Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415, has no application to this case.

RALPH L. POPPERT, APPELLANT, V. BROTHERHOOD OF RAILROAD TRAINMEN ET AL., APPELLEES.

189 N. W. 2d 469

Filed September 3, 1971. No. 37857.

1. **Labor and Labor Relations: Administrative Law: Contracts: Jurisdiction: Actions.** The right of a workman to sue a railroad company for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act and the collective bargaining agreement, provided he has elected to consider his employment at an end and does not seek reinstatement.
2. ———: ———: ———: ———: ———. The right of a member to sue his union is not dependent upon prior exhaustion of administrative remedies under the Railway Labor Act and the collective bargaining agreement as these procedures have no reference to disputes between the member and the union.
3. **Pleadings: Courts.** It is an abuse of discretion for the trial court to refuse to permit an amendment in furtherance of justice.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded for further proceedings.

Robert L. Paulick and Gary L. Thompson, for appellant.

Robert E. O'Connor, Howard E. Coray, Jerome Given, Harry Lustgarten, Jr., and Cronin & Shamberg, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The plaintiff brought this action in the district court for Hall County against his employer, the Union Pacific Railroad Company, and the defendant unions of which he was a member. The action is founded upon the plaintiff's claimed rights under a collective bargaining agreement which existed between the railroad and the unions and of which the plaintiff as an employee is the

beneficiary. On separate motions by the defendants the trial court dismissed the plaintiff's petition. We reverse the order of the trial court and remand the cause for further proceedings.

In his second amended petition, plaintiff sought money damages for wrongful discharge based upon an allegedly coerced resignation forced upon him on April 26, 1966, by the combined efforts of the defendants. In a fourth cause of action he alleged the resignation to be null and void and that he was entitled to "reinstatement with the Defendant, UP, with all of his seniority rights reinstated."

In separate answers to the second amended petition the defendants denied having coerced the plaintiff into resigning and, among other things, alleged that the plaintiff had voluntarily resigned rather than undergo an investigation by the railroad under Rule 84 of the collective bargaining agreement of criminal charges allegedly filed against him.

Prevoius to the filing of the answers, the plaintiff, in response to a request for admissions made by the defendant railroad, admitted: (1) The existence of Rule 84 which provided for a hearing prior to discipline or dismissal, and for an appeal procedure within the railroad organization; (2) the execution and delivery of a letter dated May 24, 1967, requesting reinstatement; (3) he had made no other appeal, claim, or request; and (4) he had not commenced before the National Railroad Adjustment Board any proceeding involved in the matter presented in his second amended petition for wrongful discharge. In his answers, however, plaintiff specifically denied a request to admit that he had never elected to consider his employment relationship with Union Pacific Railroad Company as having been permanently severed.

On September 14, 1970, the defendant railroad filed the motion to dismiss the plaintiff's action. The reasons stated were: "1. That the Court lacks jurisdiction of the subject matter for the reason that the subject matter of plaintiff's Amended Petition is subject to the ex-

clusive jurisdiction of the National Railroad Adjustment Board. 2. That the Court lacks jurisdiction of the subject matter for the reason that the plaintiff has failed to pursue and exhaust the remedies and procedures required by the collective bargaining agreement and the Railway Labor Act. 3. That the Petition fails to state a cause of action or claim upon which relief can be granted for the reason that Plaintiff failed to comply with the procedural provisions of the collective bargaining agreement within the time limits specified therein and such failure contractually bars his claim."

The defendant unions on September 16, 1970, filed a motion to dismiss based upon identical grounds, but adding: "4. That the plaintiff failed to exhaust his internal remedies pursuant to the collective bargaining agreement, the rules constitution and by laws of the defendant unions."

On October 2, 1970, the plaintiff filed a motion to dismiss his fourth cause of action and to delete from the prayer of his second amended petition the words "together with reinstatement of seniority rights with the Defendant, U. P."

On October 2, 1970, the trial court granted the respective motions of the railroad and the unions and dismissed plaintiff's petition.

The order of the trial court does not give the reason or reasons for its dismissal of the petition of the plaintiff. However the briefs of the parties discuss primarily the following reasons: The court did not have jurisdiction because of the failure of the plaintiff to exhaust the administrative remedies afforded by Rule 84 of the collective bargaining agreement prior to resort to court action; and that because plaintiff had not accepted his employment as terminated but sought reinstatement under his fourth cause, relief is afforded only by the terms of the Railway Labor Act, 45 U.S.C.A., § 153 First (i), and only the National Railroad Adjustment Board has jurisdiction. The defendant unions in addition argue that the area of

dispute has been preempted by federal law and only the federal courts have jurisdiction after exhaustion of administrative remedies, and that plaintiff has not availed himself of remedies afforded by the bylaws and constitution of the voluntary association known as the union.

We will first consider the contention of the defendant unions. We point out that under the provisions of the Railway Labor Act the National Railroad Adjustment Board has no jurisdiction over disputes between employees and the union. Carroll v. Brotherhood of R.R. Trainmen, 417 F. 2d 1025, cert. den. 397 U. S. 1039, 90 S. Ct. 1359, 25 L. Ed. 2d 650. The administrative remedies afforded by Rule 84 do not pertain to disputes between an employee and the union. They lead only to ultimate disposition of an employee-employer dispute before the National Railroad Adjustment Board. See Railway Labor Act, 45 U.S.C.A., § 153 First (i). The defendant unions' contention that compliance by plaintiff with administrative remedies afforded by the collective bargaining agreement is a condition precedent to suit against them has no merit.

The assertion by the defendant unions that the federal courts have exclusive jurisdiction of suits against the unions is made without citation of authority in point. Vaca v. Sipes, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842, cited by the defendant unions, supports by analogy a position contrary to that of the unions. There the Supreme Court of the United States held the state court (Missouri) did have jurisdiction of suit by a member against the union for breach of duty to fairly represent him. The claim of a union member against the union for breach of the union's duty of fair representation is wholly distinct from the right of a member against an employer under the Railway Labor Act. Czosek v. O'Mara, 397 U. S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). An action against the employer and the union for breach of their separate obligation may, however, be joined. Vaca v. Sipes, *supra*. The defendant unions' claims with

reference to remedy afforded by their bylaws and constitution are without foundation in the record. No bylaws or constitution appear. We cannot take judicial notice of the constitution and bylaws of any private organization.

The defendant unions' contentions are without merit and as to them the dismissal was error.

The plaintiff relies upon Moore v. Illinois Central R.R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, where the court held that the right of a workman to sue a railroad for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act or the collective bargaining agreement. The defendant railroad relies upon Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965), a case coming within the purview of the Labor Management Relations Act, where the court held that contract grievance procedures must be exhausted before direct legal redress is sought. That case and others, the defendant railroad says, foreshadow the overruling by the United States Supreme Court of Moore v. Illinois Central R.R. Co., *supra*.

The defendant railroad further says that, even if Moore is still considered to be good law exceptions which have been engrafted upon Moore by such cases as Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653, 73 S. Ct. 906, 97 L. Ed. 1325, hold that where state law requires exhaustion of adiministrative remedies the plaintiff still states no cause of action unless he alleges facts to show he has exhausted such remedies. The defendant railroad maintains that Nebraska law requires such exhaustion and cites Crisler v. Crum, 115 Neb. 375, 213 N. W. 366; and Wilber v. Lincoln Aerie, F. O. E., 99 Neb. 428, 156 N. W. 658.

The defendant railroad further states that under the doctrine of Slocum v. Delaware, L. & W. R.R. Co., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, and certain cases following it, the plaintiff does not state a cause of action

because where the petition prays for reinstatement it is conclusively indicated that the employee has not elected to consider his employment terminated and exclusive jurisdiction in such instances is with the National Railroad Adjustment Board rather than the courts.

We will first discuss the status of Moore. Despite the attacks made upon Moore by a minority of the United States Supreme Court and others and despite predictions made for its demise, it has not to this date been overruled. In Walker v. Southern Ry. Co., 385 U. S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 (1966), the United States Supreme Court was squarely confronted with an opportunity to overrule Moore and did not do so, reiterating the principle that if the employee accepts his discharge as final he may bring a law action in an appropriate state court for money damages without exhausting his administrative remedies. Moore is still being followed. Ferguson v. Seaboard Air Line R.R. Co., 400 F. 2d 473; Belanger v. New York Central R.R. Co., 384 F. 2d 35; McDonald v. Chicago, M., St. P. & P. R.R. Co., 38 Wis. 2d 526, 157 N. W. 2d 553. In Belanger the court denied relief because state law required exhaustion of administrative remedies. Transcontinental & Western Air, Inc. v. Koppal, *supra,* is to the same effect. In McDonald the court granted relief because state law did not require exhaustion of adiministrative remedies. There is no indication in the 1966 amendments to the Railway Labor Act, Pub. L. 89-456, 80 Stat. 208, effective June 20, 1966, of Congressional intent to foreclose an election of remedies. See Florida East Coast Ry. Co. v. Hill (Fla. App.), 233 So. 2d 845.

Defendant railroad asserts the rule that state substantive law relative to the questions of whether administrative remedies must first be exhausted governs is no longer applicable and that federal substantive law now governs and such law requires exhaustion before court action. Defendant railroad cites Republic Steel Corp. v. Maddox, *supra;* and Buchanan v. St. Louis South-

western Ry. Co. (Tex. Civ. App.), 400 S. W. 2d 362 (1966). As we have pointed out, Walker v. Southern Ry. Co., *supra,* seems to be the latest pronouncement of the United States Supreme Court on the subject and Moore is still in good standing.

The next question therefore becomes: Does Nebraska law require exhaustion of administrative remedies as a condition precedent to court action? This court decided that in the negative in Rentschler v. Missouri P. R.R. Co., 126 Neb. 493, 504, 253 N. W. 694, 95 A. L. R. 1. That case was an action by an employee to recover earnings lost because another had been employed in his place in violation of the plaintiff's seniority rights under the collective bargaining agreement. He submitted his claim to arbitration under the agreement and after several hearings, the last of which resulted in a tie vote, he brought the court action. The contention made was apparently that because he had not followed the arbitration procedures to their conclusion he was barred from court action. This court held that if the agreement for arbitration was construed to waive the plaintiff's right to sue then it was contrary to public policy and void. The court pointed to Article I, section 13, Constitution of Nebraska, which says: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." In Sandobal v. Armour & Co., 429 F. 2d 249 (1970), the Eighth Circuit, applying Nebraska law in another suit under a collective bargaining agreement, cited the Rentschler case for the proposition that a refusal to arbitrate in accordance with the terms of the contract is not available as a defense in an action on the contract. Until federal law clearly preempts the field, we feel compelled to follow the above precedents. Administrative remedies, if elected, are exclusive. Union Pacific R.R. Co. v. Price, 360 U. S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460. As previously noted, defendant railroad cites

Crisler v. Crum, *supra,* for the proposition that Nebraska law does require exhaustion of administrative remedies. The case is not in point for it involved a controversy between union members relative to the internal affairs of the union. The court held that the plaintiff must first seek relief under the bylaws of the union before seeking court relief. The situation in Crum is analogous to situations which involve the internal affairs of lodges and churches where the courts seem uniformly to hold that relief must first be sought within the organization. Such a case is Wilber v. Lincoln Aerie, F. O. E., *supra,* also cited by the defendant railroad. The state does not have the same interest in the internal affairs of such organizations as it does in collective bargaining agreements and different public policy considerations apply. We hold that under Nebraska law in an action by an employee for wrongful discharge under a collective bargaining agreement prior exhaustion of administrative remedies is not required.

If the plaintiff had persisted in his request for reinstatement and in not accepting his discharge as final then that was a form of relief which was not within the power of the court to grant for exclusive jurisdiction of the whole matter in such cases is vested in the National Railroad Adjustment Board. Walters v. Chicago & North Western Ry. Co., 216 F. 2d 332; Walker v. Southern Ry. Co., *supra;* Slocum v. Delaware, L. & W. R.R. Co., *supra.* However, in this case, the plaintiff, at the time the order of the court dismissing his petition was entered, had on file, as we have already noted, a motion to dismiss his fourth cause of action and to eliminate the prayer for reinstatement of seniority rights. He had earlier in response to the request for admissions further indicated that he considered his employment as terminated. By these actions, plaintiff in the trial court had indicated a change in theory, and an intention to amend his petition to abandon his claim for reinstatement and to accept his discharge, if such it was, as final. In Walters

v. Chicago & North Western Ry. Co., *supra,* the court indicated that if in the trial court the plaintiff had amended her complaint to eliminate the claim for reinstatement or had made a record in the trial court of a corresponding change in theory, then she would have been entitled to pursue her claim for wrongful discharge. Upon final determination of his suit for damages this action will be res judicata of any other claim plaintiff might have. Under Nebraska statutes plaintiff has an absolute right to dismiss without prejudice. § 25-601, R. R. S. 1943; Duffy v. Cody, 129 Neb. 737, 262 N. W. 828. Under the circumstances here, of course, his abandonment of his claim for reinstatement must be with prejudice, otherwise the dismissal by the trial court of the plaintiff's petition as against the railroad will be affirmed.

There is another reason why the objection of failure to follow administrative remedies is not well taken. If the allegation of the plaintiff's petition that the defendant unions refused to represent the plaintiff and if the allegation to the effect that the defendant railroad and the defendant unions acted in concert to coerce his resignation are true, then resort to administrative remedies may have been futile. See, Glover v. St. Louis-S. F. Ry. Co., 393 U. S. 324, 329, 89 S. Ct. 548, 21 L. Ed. 2d 519; Vaca v. Sipes, *supra.*

One further contention of the defendant railroad should be noted. It claims that since the collective bargaining agreement contains time limitations on implementation of administrative remedies this action is barred by contractual time limitation. Defendant railroad cites several cases in which exhaustion of administrative remedies were held to be a condition precedent to court action and the employee plaintiff had failed to meet the time limits in the administrative remedies. They have no application here. It also cites Breeland v. Southern Pacific Co., 231 F. 2d 576. In that case plaintiff elected to exercise administrative remedies and thereafter waited

longer than the time provided by the agreement before filing suit. The court held he was bound by the limitation in the agreement, his right of action accrued at the time of the discharge, and the action was barred by the statute of limitations on an action on a written contract. In jurisdictions where exhaustion of administrative remedies is not required the state statute of limitations on written contracts applies. Moore v. Illinois Central R.R. Co., *supra,* Union Pac. R. Co. v. Olive, 156 F. 2d 737; Davis v. Rush (Tex. Civ. App.), 288 S. W. 504.

This opinion is not to be taken as expressing any views on the substantive claims of the plaintiff. It is simply a decision that the trial court does have jurisdiction.

Since the preparation of the foregoing portion of this opinion, the Supreme Court of the United States on June 14, 1971, released its opinion in Amalgamated Assn. of St., E. Ry. & M. C. Emp. v. Lockridge, 403 U. S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473. In that case the court held in an action by an employee (in a situation where the employee was covered by the National Labor Relations Act) against his union for having wrongfully caused his discharge from his employment by having terminated his union membership by a misapplication of the rules relative to suspension for nonpayment of dues, that the state and federal courts had no jurisdiction. The opinion was grounded on San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775. The Supreme Court held that since the union action in procuring the member's dismissal because of nonpayment of dues was arguably covered by the unfair labor practices provisions of the National Labor Relations Act, federal law preempted and the National Labor Relations Board and not the state and federal courts had jurisdiction.

We conclude that Amalgamated Assn. of St., E. Ry. & M. C. Emp. v. Lockridge, *supra,* is not applicable because under the provisions of the Railway Labor Act (which is the federal labor law applicable in this case)

the National Railroad Adjustment Board has no jurisdiction of controversies between the union and its members, Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80, and therefore the preemption doctrine has no application here.

The order of dismissal by the trial court is reversed and the cause remanded for further proceedings consonant with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCOWN and BOSLAUGH, JJ., dissent.

DONALD R. HAYS, TRUSTEE, APPELLEE AND CROSS-APPELLANT, V. ROLLIE C. JOHNSON, APPELLEE AND CROSS-APPELLANT, BETTY J. JOHNSON ET AL., APPELLEES, IMPLEADED WITH JOHN McARTHUR ET AL., APPELLANTS.

189 N. W. 2d 475

Filed September 3, 1971. No. 37860.

1. **Wills: Actions: Evidence.** In an action for the construction of a will, extrinsic evidence is admissible to show the attendant circumstances under which the will was made and to enable the court to place itself in the situation of the testator.
2. **Estates: Property: Parties: Partnerships.** Parties claiming an interest in the property of a decedent by reason of an alleged partnership with the decedent are adverse to the decedent and his representatives.

Appeal from the district court for Lancaster County: WILLIAM F. COLWELL, Judge. Affirmed.

A. James McArthur, for appellants.

Christensen, Glynn & Hendricks, for appellee Donald R. Hays.

Kenneth Cobb and J. S. Berry, for appellee Rollie C. Johnson.

Charles S. Reed and William P. Kelley, for appellee Virginia Reller.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action to construe the will of Merril R. Reller who died on August 1, 1968. His will was admitted to probate and his estate administered by proceedings in the county court of Lancaster County, Nebraska. The will was executed on June 11, 1968.

The controversy here concerns the Commercial Center which is a tract of land lying north of Cornhusker Highway and west of 40th Street in Lincoln, Nebraska. The Commercial Center includes a large trailer court and a number of business buildings and was valued in the estate proceedings at $322,635. It was purchased by the deceased in 1949.

Paragraph III of the will devised the Commercial Center in trust to Donald R. Hays, subject to terms and conditions set out in the will. This action was brought by Donald R. Hays to obtain a construction of the will in regard to his duties as trustee. The defendants are Virginia Reller, the widow of the deceased; Herbert Reller, Helen Reller, and Carl R. Reller, heirs-at-law of the deceased; and Rollie C. Johnson, Betty J. Johnson, Gordon Reller, Sally A. Hays, John McArthur, and A. James McArthur.

The will provides generally that the Commercial Center shall be held in trust during the life of Virginia Reller and for 5 years thereafter, with the remainder to Donald R. Hays and Sally A. Hays, John McArthur, and Rollie C. Johnson. The will provides what is to be done in the event of a sale of all or part of the Commercial Center and provides for contingent beneficiaries.

Paragraph III (C) of the will provides in part: "The present method of conducting business, rentals and divisions of profits shall be continued as near as practicable and that the share of the profits received therefrom,

now received by Merril R. Reller, shall be paid by the trustee to Virginia Reller, with the express provision that if, at any time, the net rentals and income received by Virginia Reller, after payment of management fees, taxes and upkeep, is less than $1,000.00 per month net to Virginia Reller for a period of three months consecutively, then Virginia Reller may, at her option, require the Commercial Center to be sold, and this power of sale, should above conditions arise, shall be absolute and without question. I specifically provide that so long as the $1,000.00 per month is received by Virginia Reller, whether it come from actual rentals or personal contributions by any of the parties having a surviving interest therein, that the power of sale provided herein not be exercised."

The controversy centers around this part of the will. The language of the will itself is unintelligible in the absence of extrinsic evidence as to the "present method of conducting business, rentals and divisions of profits." Such evidence is admissible to show the attendant circumstances under which the will was made and to enable the court to place itself in the situation of the testator. Davis v. Wirth, 178 Neb. 74, 131 N. W. 2d 718; In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704; Little v. Giles, 25 Neb. 313, 41 N. W. 186.

The record shows that after the Commercial Center was purchased by the testator, it was operated by the testator, John McArthur, and Rollie C. Johnson. After 1962, Donald R. Hays participated in its operation. McArthur and Hays were associated with the testator in the practice of law. Johnson worked full time and had the direct management of the trailer court.

The answer filed by the defendants John McArthur and Sally A. Hays alleged that the persons who were active in the management of the Commercial Center had "acquired interest therein in unequal amounts" and prayed that the court "confirm the rights and interests of all of the parties hereto."

The trial court found that the record title to the Commercial Center was in the testator at the time of his death and that the evidence did not show the existence of a partnership composed of the testator, John McArthur, Rollie C. Johnson, Donald R. Hays, Sally A. Hays, or any of them.

The defendants John McArthur and Sally A. Hays have appealed. The plaintiff, Donald R. Hays, and the defendant Rollie C. Johnson have cross-appealed.

To the extent that the plaintiff and any of the defendants claimed any interest in the Commercial Center, other than as beneficiaries under the will of the deceased, their interest was adverse to that of the deceased and his representatives, and their testimony as to transactions and conversations with the deceased was not admissible under section 25-1202, R. S. Supp., 1969. Reitz v. Petersen, 131 Neb. 706, 269 N. W. 811; Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849.

The remaining evidence does not sustain the appellants' claim in regard to a partnership. There are no partnership records, in the usual sense, for the Commercial Center. There are no books of account, and the Commercial Center had no checking account. A written agreement, dated July 3, 1966, signed by the deceased, John McArthur, Donald R. Hays, and Sally A. Hays was received in evidence. This agreement referred to a partnership engaged in the *operation* of a business known as the Commercial Center. The agreement further provided that legal title to the Commercial Center would remain in the deceased and that he would "maintain in effect a will which preserves the interests of all the remaining partners in the said Commercial Center." The agreement indicates that the deceased may have intended to contribute only the *use* of the property to the alleged partnership and that no other party would acquire any interest in the Commercial

Center except by devise. See Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919.

The evidence shows that Rollie C. Johnson collected the rentals from the trailer court and from some of the tenants in the business buildings and accounted to the deceased monthly. Johnson paid certain expenses out of the rentals, deducted his share of the rentals, and then remitted the balance to the deceased.

The record contains partnership income tax returns filed in the name of the Commercial Center for each year from 1950 to 1967, inclusive. The 1967 return shows a net profit of $25,475.33 with the partners' respective shares of income as follows: The deceased, John McArthur, and Donald R. Hays, $5,095.07 each; and Rollie C. Johnson, $10,190.12. There is no other competent evidence showing that these amounts were actually received or credited to the parties involved. Except for the share of the rentals retained by Rollie C. Johnson and several isolated payments to Mr. and Mrs. Hays, the evidence does not show that anyone other than the deceased ever received any part of the income from the Commercial Center. The evidence shows that the deceased received all of the income except that retained by Rollie C. Johnson and does not show that any of it was actually distributed by him to the others listed in the partnership returns.

The trial court found that there was some evidence of a working relationship in the management of the Commercial Center between the deceased and the appellants and the cross-appellants, but that the evidence would not sustain a finding that there was a partnership or that any of the appellants or cross-appellants were entitled to share in the income from the Commercial Center during the life of Virginia Reller. These findings are sustained by the record.

The trial court found that the trustee should pay the net income from the operation of the Commercial Center to Virginia Reller monthly during her lifetime. In de-

termining the net income the trustee was authorized to deduct all operating expenses, including the remuneration to be paid to Rollie C. Johnson, repairs, taxes, and fees allowed by the county court. The trial court limited expenditures by the trustee for the replacement of machinery, appliances, equipment, fixtures, and other depreciable property to 5 percent of the annual gross income of the Commercial Center. This limitation was intended as a guideline for the trustee and is subject to modification in the event circumstances show that the limitation should be changed.

The trial court directed the trustee to continue to employ Rollie C. Johnson and limited his compensation to an amount not to exceed that received in 1967. This direction is subject to modification in the event of a change in circumstances.

The trustee complains that the trial court improperly restricted his authority to make capital improvements by requiring him to obtain the written consent of Virginia Reller for all such improvements. In Paragraph III(B), the will provides in part that "the trustee shall have the power to authorize capital improvements," and "use such portion of Virginia Reller's income therefrom for capital improvements, if she so agrees in writing." The trial court defined capital improvements as improvements to the real estate as distinguished from replacement of depreciable property, such as machinery and appliances, and ordinary repairs. With this understanding, we think the trial court's interpretation of the will was correct.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result only. The majority opinion seems to say that there is no competent evidence from which a finding could be made that those persons designated as remainderman beneficiaries in the property known as the Commercial Center are entitled under

Paragraph III (C) of the will to share the income from the Commercial Center during the lifetime of Virginia Reller. It further seems to imply that there must have been an actual distribution of income to the partners or credit on books of account in order to support a finding of a partnership in income. With this I disagree.

The filing of partnership income returns from 1950 through 1967 showing the income shares of the partners, together with the agreement of July 3, 1966, executed by Merril Reller and certain of the others, was, in my opinion, sufficient to support a finding that the "present method of conducting business rentals and division of profits" was a partnership in which the remainderman had an income interest.

There is evidence in the record which, if believed, would support a finding that it was not a bonafide partnership. I concur in the result because I believe the trial judge, who observed the witnesses and their manner of testifying, must have concluded on the basis of this evidence that there was in fact no partnership based on services accompanied by actual income sharing.

IN RE ESTATE OF MERRIL R. RELLER, DECEASED. VIRGINIA RELLER, EXECUTRIX OF THE ESTATE OF MERRIL R. RELLER, DECEASED, APPELLEE, V. JOHN MCARTHUR ET AL., APPELLANTS.
189 N. W. 2d 468

Filed September 3, 1971. No. 37861.

1. **Estates: Taxation: Pleadings: Executors and Administrators.** The liability of an estate for inheritance tax may be determined upon the petition of the executrix filed in the administration proceeding.
2. **Estates: Taxation: Evidence: Wills: Property.** Evidence as to the property of the deceased, its value, its distribution under the will, the costs and expenses of administration, and the estate taxes paid by the executrix is sufficient to sustain a determination of the inheritance tax liability of an estate.

Appeal from the district court for Lancaster County: WILLIAM F. COLWELL, Judge. Affirmed.

A. James McArthur, for appellants.

Charles S. Reed, William P. Kelley, and Pierson, Pierson & Fitchett, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an appeal from the judgment of the district court determining the amount of inheritance tax due from the estate of Merril R. Reller, deceased.

The inheritance tax liability was originally determined in the county court of Lancaster County, Nebraska, in proceedings to administer the estate of the deceased. The judgment of the district court was entered on September 14, 1970. From that judgment, John McArthur and Sally A. Hays have appealed to this court. The appellants contend that the pleadings and the evidence do not support the judgment.

The petition filed by the executrix in the district court alleged that the deceased had died testate on August 1, 1968, a resident of Lancaster County, Nebraska; and that the deceased was the owner of property having a value of $2,090,673.98 as shown on an itemized list attached to the petition. The petition prayed that the liability of the estate for inheritance tax be determined. This pleading was sufficient to invoke the jurisdiction of the court. § 77-2018.01, R. R. S. 1943.

On May 25, 1970, this proceeding was consolidated with the action to construe the will of the deceased. As a result, the trial court was able to consider the evidence introduced in both cases in determining the inheritance tax.

The evidence shows the property of the deceased, its value, the distribution made by the will, the costs and expenses of administration, and the federal and state

estate taxes paid by the executrix. This evidence was sufficient to enable the court to determine the inheritance tax due from each of the beneficiaries. The apportionment of estate taxes was proper under section 77-2108, R. R. S. 1943.

The judgment of the district court is affirmed.

AFFIRMED.

O. WILLIAM VON SEGGERN, SPECIAL ADMINISTRATOR OF THE ESTATE OF ELLA JEAN MUMMA, APPELLANT, V. SAM SAIKIN ET AL., APPELLEES.

189 N. W. 2d 512

Filed September 3, 1971. No. 37916.

1. **Torts: Actions: Jurisdiction: Statutes.** Section 1.03 (a) (3) of the Uniform Interstate and International Procedure Act applies when the tortious act or omission occurs in the state even though the resulting injury occurs elsewhere.
2. ———: ———: ———: ———. Section 1.03 (a) (4) of the Uniform Interstate and International Procedure Act authorizes the exercise of jurisdiction when the tortious act or omission takes place without the state but the injury occurs within the state and there is some other reasonable connection between the state and the defendant.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

J. William Gallup of Schrempp & Bruckner, for appellant.

Michael P. Cavel of Lathrop, Albracht & Dolan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

In this wrongful death action defendant Sam Saikin, a resident of Illinois, appeared specially to object to the

jurisdiction of the court. The district court sustained the special appearance. Plaintiff, O. William Von Seggern, special administrator of the estate of Ella Jean Mumma, appeals. He asserts that two subsections of our "long-arm" statute provided bases for the district court to exercise personal jurisdiction over Sam.

No evidence was offered in district court. Sam Saikin assumed only for purposes of the hearing on his special appearance that the allegations of the petition were true.

The petition states: Von Seggern was acting under letters of administration issued out of the county court of Sarpy County, Nebraska. At different times Sam and Joel Saikin had pursued a course of conduct to separate Ella Jean from her husband, Samuel C., and to effect her death. They made interstate calls to her at Bellevue, Sarpy County. They subsequently traveled in interstate commerce to Sarpy County where they performed "acts . . . leading to the accomplishment of said unlawful and wrongful purpose." As a result, Ella Jean "was induced to travel" to Chicago, Illinois. There on November 5, 1967, the Saikins "willfully, wantonly, maliciously, intentionally and unlawfully" slew her. She died at age 18, intestate, and an inhabitant of Sarpy County. The special administrator commenced this action for the benefit of Samuel C. Mumma as next of kin. See, § 30-809, R. R. S. 1943; S.H.A. ch. 70, § 1 (Ill., 1959).

Von Seggern asserts bases for judicial jurisdiction under section 25-536 (1) (c) and (d), R. S. Supp., 1969, which tracks section 1.03 (a) (3) and (4), Uniform Interstate and International Procedure Act. See 9B U.L.A. 310 (1966). The section of the uniform act provides in part: "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . . (3) causing tortious injury by an act or omission in this state; (4) causing tortious injury in this state by an act or omission outside this state if he . . . engages in any . . . persistent course of conduct . . . in this state; . . . (b)

When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him."

Mobility of population and other social and economic conditions called for expansion of judicial jurisdiction of a state over the person of a nonresident. See Hazard, "A General Theory of State-Court Jurisdiction," 1965 Supreme Court Review, at p. 246 (1965). Statutes and cases relating generally to the expansion have been reviewed. See, Kurland, "The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts," 25 U. Chi. L. Rev. 569 (1958); Leflar, American Conflicts Law, §§ 42 to 44, pp. 79 to 90 (1968); "State-Court Jurisdiction," 73 Harv. L. Rev., at pp. 945 to 947 (1960); "The Virginia 'Long Arm' Statute," 51 Va. L. Rev. 719 (1965).

No one has constructed a table of "minimum contacts" that will always satisfy requirements of due process. The test is fundamental fairness. See, International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057; Stucky v. Stucky, 186 Neb. 636, 185 N. W. 2d 656 (1971) (opinion by McCown, J.); Leflar, American Conflicts Law, at pp. 71 and 78 (1968); Reese and Galston, "Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction," 44 Iowa L. Rev. 249 (1959); 'The Virginia 'Long Arm' Statute," 51 Va. L. Rev. at 728 (1965).

The Commissioners' Note to section 1.03 of the uniform act reads: "Section 1.03 (a) (3) applies when the tortious act or omission occurs in the state even though the resulting injury occurs elsewhere. The state where the tortious act or omission occurs will often be the most appropriate location for the trial of the action. . . . Section 1.03 (a) (4) authorizes the exercise of jurisdiction when the tortious act or omission takes place without the state but the injury occurs within the state and there is some other reasonable connection between the state and the defendant. . . . A sufficient nexus exists

if . . . the defendant . . . in the state carries on some . . . continuous course of activity . . .. It is not necessary that this activity amount to the doing of business. . . . It should be noted that . . . the persistent course of conduct . . . need have no relationship to the act or failure to act that caused the injury. No distinctions are drawn between types of tort actions . . .. The concept of cause of action . . . should be broadly construed to cover an entire transaction so that, when possible, the entire dispute may be settled in a single litigation. Subdivision (b) is designed to prevent assertion of independent claims unrelated to any activity described in subdivision (a) of section 1.03." 9B U. L. A. pp. 311 to 313 (1966).

The phrase "tortious injury" does not necessarily have the same meaning for purposes of jurisdiction and ultimate liability. Cf. Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957) (Schaefer, J.).

The telephone calls and the acts of the Saikins were too remote to bring Von Seggern's cause of action within section 1.03 (a) (3) of the uniform act. Under subdivision (a) (4) Saikins' conduct established a connection with Nebraska, but the connection did not constitute a continuous course of activity. The connection was not reasonable in terms of a basis for jurisdiction over Sam Saikin.

The ruling sustaining the special appearance was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEITH A. RUSS, APPELLANT.

190 N. W. 2d 621

Filed October 8, 1971. No. 37917.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. On motion to dismiss appeal. Judgment affirmed.

Keith A. Russ, pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

The State moves to dismiss this appeal from a sentence on a charge of burglary. The grounds of the motion are: (1) The defendant's pro se brief was filed out of time and did not comply in any respect with the rules of this court; and (2) the appeal is frivolous; Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, has been complied with; and no hearing on the merits is required.

The defendant had entered a plea of guilty to the burglary charge and was placed on probation. He was subsequently charged with violation of the terms of the probation and entered a plea of guilty to such

violation and was sentenced on the burglary charge. He was represented by counsel at all stages of the proceedings. He perfected his own appeal while the matter was being considered by his counsel. Writ of error was issued by this court and the transcript and bill of exceptions are before us.

Counsel for the defendant, while the appeal was pending, asked leave of the trial court to withdraw as counsel and complied with Anders v. California, *supra*. The trial court found that an appeal would be frivolous and permitted counsel to withdraw.

Our consideration of the motion has required a careful review of the transcript and bill of exceptions and the claims made in the defendant's pro se brief. We have reviewed the case on the merits. The defendant's claims are without foundation.

JUDGMENT AFFIRMED.

GORDON SHOTWELL, APPELLANT AND CROSS-APPELLEE, V. INDUSTRIAL BUILDERS, INC., ET AL., APPELLEES AND CROSS-APELLANTS.

190 N. W. 2d 624

Filed October 8, 1971. No. 37935.

1. **Statutes: Workmen's Compensation.** As regards subdivision (2) of section 48-121, R. S. Supp., 1965, losses in bodily function are important only insofar as they relate to earning capacity and the loss thereof.
2. ———: ———. Disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Wright, Simmons, Hancock & Hall, for appellant.

Atkins, Ferguson & Nichols and L. M. Hahn, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action instituted before the Nebraska Workmen's Compensation Court. On hearing before the full compensation court, plaintiff received an award based upon temporary total disability for 149 4/7 weeks, 47½ percent permanent partial disability for 150 2/7 weeks, and 17½ percent permanent partial disability for the rest of his life based upon a two-member disability. The award was affirmed upon appeal to the district court. We affirm the award subject to modification as herein specified.

The accident occurred on March 7, 1966, while plaintiff was employed as a surveyor's rodman by defendant, receiving $94.05 per week. There is no dispute with reference to the employment, the accident, or the nature of the injuries received. Plaintiff was 18 years of age, had recently been graduated from high school, and had taken a short course in welding. He had no fixed occupation, but occasionally painted automobiles. He worked for defendant as a rodman, common laborer, heavy equipment operator, steel tier, and welder.

His injuries consisted of a fractured right ulna at the elbow, multiple fractures of the right foot, a compression fracture of the fifth lumbar vertebra, possible fractures of the first and second lumbar vertebrae, and a fractured right wrist. He gradually lost the hearing in one ear; was subjected to occasional but persistent headaches; and had persistent low back pain, a left foot drop, numbness and atrophy of the left leg, clawing of the toes of the left foot, a deformed right foot with a bony protuberance, difficulty urinating, bowel troubles, curvature of the spine, restriction of back motion and weakness in back, a 10 degree restriction of movement in the right wrist, nervousness, and shakiness. Physical impairment was estimated at 10 percent for the right

foot, 20 to 25 percent for the left leg, and 35 percent for the body as a whole. The conditions mentioned still prevailed more than 4 years after the accident and estimates of physical impairment were based upon plaintiff's condition at that time.

It is undisputed that plaintiff's condition will deteriorate with the passage of time. As one medical expert put it, he will need the services of an orthopedist and urologist for the rest of his life. It is entirely possible that he may become totally disabled. If so, he may seek relief under section 48-141, R. R. S. 1943. We cannot at this time agree with plaintiff's contention that he is presently totally disabled. After recuperating from his injuries, he was unable to find employment in his home area and moved to Portland, Oregon. There he found employment doing electric wiring but was transferred to a painting job as he could not endure the bending over required in the electrical work. Due to adverse effects from paint fumes, he can no longer act as a painter. His employer went out of business and he obtained another job as a welder which did not require bending over. He was still so employed at the time of trial. Due to his physical handicaps, he was paid 50 cents to $1 an hour less than others doing the same work. He also works part-time selling tickets at a nightclub, a position which permits him to sit. It is apparent that due to his youth and determination, he has in some measure rehabilitated himself, but the fact remains that his employability has been severely restricted. He can no longer do heavy common labor, operate heavy equipment, act as a rodman, do types of labor requiring walking, lifting, or bending. In other than a tight labor market, he, as a handicapped worker, will find it difficult to secure employment should he lose his present position.

Losses in bodily function are important only insofar as they relate to earning capacity and the loss thereof. See Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275.

It is evident that plaintiff still retains a measure of earning capacity and cannot at this time be classified as one totally and permanently disabled. On the other hand, the extent of his bodily impairment is not necessarily synonymous with or determinative of his employability and earning capacity. Disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. See Nordahl v. Erickson, *supra*. The record supports the finding that plaintiff sustained a two-member disability amounting to a 25 percent impairment of the left leg and a 10 percent impairment of the right foot. The lower courts averaged this out and concluded that plaintiff had a permanent partial disability of 17½ percent, entitling him to $7.41 per week, after the first 300 weeks, during his life. It was found that physical impairment and disability in the sense of loss of employability and earning capacity were the same. With this we agree. As previously pointed out, the types of employment for which plaintiff was originally fitted have been greatly restricted by his injury and present physical condition.

Under subdivision (2) of section 48-121, R. S. Supp., 1965, plaintiff was allowed the sum of $29.78 each week for 150 2/7 weeks for a 47½ percent permanent partial disability to the body as a whole. It is evident that in considering this feature of the case, the trial court failed to take into consideration several of the bodily ailments suffered by plaintiff. We find that this partial disability amounted to 65 percent and that plaintiff should receive the sum of $40.74 each week for the 150 2/7 week period.

Section 48-120, R. R. S. 1943, provides: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, * * * subject to the approval of the compensation court, * * *." The undisputed evidence indicates plaintiff will require medicines, and medical and hospital services in the future as a result of his injuries. If and when such

items are required, they shall, subject to approval by the compensation court, be supplied at defendants' expense. See Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918.

Subject to the foregoing modifications, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I respectfully dissent. I cannot be a party to a decision which penalizes determination and extreme effort to be self-supporting despite the physical infirmities set out in the majority opinion, which to me constitute permanent disability. In the present day and age, most employees sustaining the plaintiff's disabilities would not attempt to do any type of work and would clearly be found totally disabled.

We have repeatedly held that total disability does not mean a state of absolute helplessness but rather it means the disablement of the employee to earn wages in the same kind of or similar work for which he was trained.

At the time of his injury plaintiff, a partial paraplegic, had worked at and was able to perform a specialty called pin striping; to do heavy common labor; to tie steel as a steel worker; work as a carpenter's helper; to operate heavy equipment; to act as a rodman; and to do any type of labor requiring walking, lifting, or bending. As the majority opinion states, he can no longer do any of these tasks. Since his injury he has tried electrical wiring and painting but is physically unable to perform the tasks that work requires. At the time of the trial he was employed as a spot welder of switch breaker boxes, but due to his physical handicaps was paid less than others doing the same work. He is unable to do lifting of any nature, and is only able to weld work brought to him. While he cannot perform several of the tasks required in his job, probably because of his intense desire to be a useful citizen his present employer has worked out these problems for him, but

most employers would consider him unemployable.

Plaintiff retains a measure of earning capacity solely because of his determination to overcome extreme disabilities. Clearly, plaintiff has sustained a loss of earning capacity equivalent to or greater than that sustained by the claimant in Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152; Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275; Mead v. Missouri Valley Grain, Inc., 178 Neb. 553, 134 N. W. 2d 243; and Brockhaus v. L. E. Ball Construction Co., 180 Neb. 737, 145 N. W. 2d 341, where we found permanent total disability. For all intents and purposes he is totally disabled. The majority opinion certainly thwarts the beneficent purposes of the Nebraska Workmen's Compensation Act by a highly technical refinement of interpretation.

WHITE, C. J., and MCCOWN, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GEORGE HAYES, APPELLANT.
190 N. W. 2d 621

Filed October 8, 1971. No. 37803.

Criminal Law: Evidence: Trial. Where the classification or degree of a crime depends upon the determination of a certain minimal value of property and there is a market for that type of property, the State must present proof by competent evidence that the market value of the property at the time and place of the crime charged was equal to or exceeded the designated minimal value.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded for new trial.

Thomas D. Carey and Arnold D. Kenyon, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The appellant was charged with receiving or buying stolen goods, to wit, an air conditioner of the value of $100 or upwards with intent to defraud the owner and the jury returned a verdict of guilty. The sole question presented in this appeal is the sufficiency of the evidence to sustain a finding that the value of the property at the time of the receipt or purchase was of the value of $100 or more.

The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt.

This and other courts have long held that where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place. Robinson v. State, 107 Neb. 591, 186 N. W. 977; Edmonds v. State, 42 Neb. 684, 60 N. W. 957; Engster v. State, 11 Neb. 539, 10 N. W. 453; Rooney v. State, 51 Neb. 576, 71 N. W. 309; Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171; Brooks v. State, 28 Neb. 389, 44 N. W. 436. Only where there is no market value may present replacement or other similar value be used. State v. Randle, 2 Ariz. App. 569, 410 P. 2d 687; 50 Am. Jur. 2d, Larceny, § 45, p. 209.

The State did not present evidence that there was no market for the goods of the type in question. Its only evidence of value was the testimony of an agent of the owner that his recollection of the purchase price of the item was about $225 and that the owner had had it: "Several years, not quite that long, possibly in the third year of having it or maybe less than that." Testimony as to the purchase price of an item costing $225 about 3 years previously is not sufficient to establish either its market or actual value on the date in question.

This witness further testified over objections that reimbursement received from the insurance company was about "$179.00, or one hundred eighty-some, something like that." And, also, "it was right about $170.00 or possibly slightly more that that." There was no evidence to establish the basis of reimbursement by the insurance company. This evidence was insufficient to establish market value on the date in question. The State relies upon State v. Carroll, 186 Neb. 148, 181 N. W. 2d 436. That case does not sustain the State's position. In that case there was testimony of a qualified witness of the wholesale and retail market value of the property in question at the time of the crime.

We hold that the evidence was legally insufficient to establish the market value of the air conditioner on the date of receipt, or in the alternative that there was no market value for the property and what the actual value was.

The defendant introduced the testimony of a dealer in such items who had examined the air conditioner at the police station. He testified that the market value of the item on the date in question was $50 wholesale and $75 retail. There was therefore competent evidence to sustain the verdict as to the lesser-included offense of receiving stolen property of the value less than $100. § 28-513, R. R. S. 1943.

The jury was not directed to make a specific finding of value in its verdict nor is this required. The defendant did not request an instruction on the lesser-included offense. Since the evidence of value is legally insufficient to sustain a finding of value of $100 or upwards, the judgment of the trial court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. SAM VIRGILITO, JR., APPELLANT.
190 N. W. 2d 781

Filed October 8, 1971. No. 38015.

1. **Post Conviction: Pleadings: Incompetent Persons.** Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding.
2. **Post Conviction: Pleadings: Trial.** The Nebraska Post Conviction Act requires that unless the motion and the files and records of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Reversed and remanded with directions.

Sam Virgilito, Jr., pro se.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

On September 17, 1970, the defendant pleaded guilty to manslaughter and on the same day was sentenced to 5 years imprisonment. In 1971, defendant began this proceeding under the Nebraska Post Conviction Act alleging that he was mentally incompetent to enter the plea of guilty. From an examination of the files and records, the district court found that the defendant was entitled to no relief; that an evidentiary hearing should not be held; and that counsel should not be appointed for the defendant. The motion to vacate sentence was overruled and defendant filed this appeal pro se.

A transcript and bill of exceptions have been filed, certified to contain all evidence, both oral and docu-

mentary. These constitute the "files and records of the case." They show that on April 17, 1970, an information was filed charging the defendant with first degree murder. Counsel was appointed on that date and represented the defendant throughout the proceedings. On April 24, 1970, the court authorized a psychiatric examination of the defendant for the purpose of determining whether he was competent to stand trial. A neuropsychiatric examination of the defendant was made by Dr. C. H. Farrell. His report reveals an extensive history of mental illness. Defendant had been hospitalized, and had been examined by Dr. Farrell on numerous previous occasions. Dr. Farrell's report of May 28, 1970, stated: "It is this examiner's opinion that this man is a chronic mental defective and a chronic schizophrenic. It is also this examiner's opinion that there are times when he has lucid intervals but that he also has many psychotic episodes. There is some doubt as to whether he can aid in his own defense."

On June 3, 1970, after receiving the report from Dr. Farrell, the district court entered an order that the defendant was not competent to stand trial and committed him to the Lincoln State Hospital until such time as his disability might be removed. The record shows that on August 12, 1970, the director of the Lincoln Regional Center submitted to the district court what is referred to as a "letter" or a "certificate" to the effect that the defendant was "now competent to stand trial." There is no copy of this document in the record. There is no evidence as to the data upon which the document was based. There is no other evidence in the record to dispute Dr. Farrell's opinion and diagnosis. No hearing was ever held to determine defendant's competency and apparently the court never entered any order finding the defendant competent to stand trial.

At the time of the arraignment on September 17, 1970, an amended information was filed charging the defendant with manslaughter in Count I, and with first

degree murder in Count II. After the guilty plea to Count I was accepted, Count II was dismissed. The only inquiry as to competence made at the arraignment, plea, and sentencing was to ask the defendant if he felt he was competent to proceed "like they claim you are down at Lincoln," to which he answered: "Okay." The record also shows that the county attorney expressed the hope and recommended to the court that the defendant get "further psychiatric treatment and help."

It is true that bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient, and justify the summary dismissal of a post conviction proceeding. See Fisher v. United States, 317 F. 2d 352. That rule does not fit the facts here.

The Nebraska Post Conviction Act requires that unless the motion and the files and records of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. See § 29-3001, R. S. Supp., 1969.

It is entirely possible that the district judge was aware of ample evidence to establish the defendant's competency to stand trial, but that evidence, if any, does not appear in the record. The record before us clearly establishes sufficient factual basis to require full exploration by the district court.

The order of the district court overruling the motion for post conviction relief is vacated and the cause remanded to the district court with directions to grant a prompt evidentiary hearing on the motion and proceed in accordance with the provisions of the Nebraska Post Conviction Act.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. CRUSE, APPELLANT.

190 N. W. 2d 629

Filed October 8, 1971. No. 38043.

1. **Post Conviction: Trial: Sentences: Guilty Plea.** The standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to defendant.
2. **Sentences: Notice: Hearing.** A court should not correct an erroneous record of a criminal sentence without affording the parties a hearing.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Edward A. Cruse, pro se.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A motion of Edward A. Cruse for post conviction relief was denied without a complete evidentiary hearing. He appeals, asserting involuntariness of his guilty plea and error in the court's correcting the record of his sentence without notification.

The journal of the district court, Judge Krell presiding, on May 1, 1970, set out a sentence of Cruse to imprisonment from 1 to 5 years. On June 2 the court without notification to either party ordered correction of the journal as follows: " 'for a period of 2 to 5 years' as per court's pronouncement from the bench at the time of sentence."

Cruse appeared with counsel on October 19, 1970, on an order to show cause in connection with his post conviction motion. The matter was continued by agreement in order for the court reporter to transcribe his notes. On December 11 the State and Cruse's counsel appeared

before the court, Judge Brodkey presiding. The court reporter's certified verbatim record of the plea and sentencing hearings was received in evidence.

The general standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to defendant. State v. Gray, 187 Neb. 197, 188 N. W. 2d 705 (1971); State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971). Evidence of compliance at Cruse's plea hearing is replete.

A court should not correct an erroneous record of a criminal sentence without affording the parties a hearing. State v. Kortum, 176 Neb. 108, 125 N. W. 2d 196 (1963). Judge Krell did not testify, and no entry in his minute book was offered in evidence.

The reporter's evidence is undisputed that the court three times informed Cruse that the sentence was 2 to 5 years. The error of the court in correcting the journal without notification and hearing was harmless in view of the subsequent proceeding. Cf. Kennedy v. Reid, 249 F. 2d 492 (D. C. Cir., 1957).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS L. RHODES, APPELLANT.
190 N. W. 2d 623

Filed October 8, 1971. No. 38060.

Post Conviction: Evidence. In a post conviction proceeding, the burden of proof is on the petitioner to establish the basis for relief.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Douglas L. Rhodes, pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This appeal from a denial of post conviction relief presents a very narrow issue. Appellant claims the failure of the trial court to advise him of his ineligibility for parole negates his guilty plea. There is no merit to appellant's contention.

On October 26, 1966, appellant, in the presence of his court-appointed counsel, entered a plea of guilty to a check charge and was sentenced for a term of 3 years in the Nebraska Penal and Correctional Complex, said sentence to be served consecutive to and to commence at the expiration of any sentences then being served. Appellant was then returned to California to complete his sentence in that state. In 1970 when he was paroled from the California state prison he was returned to Nebraska to serve his sentence.

Appellant insists his plea was involuntary because he was not told that he would be ineligible for parole under a sentence for a specific term. Appellant is confusing state and federal procedures. This question has been raised under rule 11, Federal Rules, Criminal Procedure, which is not binding on state courts, and there is a decided split of authority among the various Circuit Courts of Appeals on the point. If it were material, we would believe the correct holding would be that noneligibility for parole is not a consequence of a plea of guilty. Rather, it is the consequence of the withholding of legislative grace. See, Smith v. United States, 324 F. 2d 436; Trujillo v. United States, 377 F. 2d 266; and Sanchez v. United States, 417 F. 2d 494.

Under section 83-1,110, R. S. Supp., 1969, appellant is eligible for parole upon the completion of his sentence less the reductions granted to him. Laws 1969, c. 817, § 41, p. 3093. See, also, State v. McMillian, 186 Neb. 784, 186 N. W. 2d 481.

In a post conviction proceeding, the burden of proof is on the petitioner to establish a basis for relief. State v. Coffen, 184 Neb. 254, 166 N. W. 2d 593. This the appellant has failed to do.

The judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY BULLARD, APPELLANT.
190 N. W. 2d 628

Filed October 8, 1971. No. 38064.

Post Conviction: Judgments. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.

Appeal from the district court for Douglas County: DONALD HAMILTON, Judge. Affirmed.

Leroy Bullard, pro se.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

In 1962, the defendant was charged in separate informations with first degree murder in the death of Jesse Jones and Jesse D. Drake. Later the informations were amended to charge murder in the second degree. The defendant pleaded guilty to both offenses and was sentenced to life imprisonment on each charge. The sentence on the second charge was made consecutive to the sentence on the first charge.

The defendant now seeks to modify the sentence on the second charge so that it will be concurrent with

the sentence on the first charge. The Post Conviction Act does not authorize such relief.

Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. § 29-3001, R. S. Supp., 1969. No such issue is presented here. See Annotation, 33 A. L. R. 3d 335, at p. 368.

The judgment of the district court denying relief under the Post Conviction Act is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD EUGENE WARNER, APPELLANT.

190 N. W. 2d 786

Filed October 15, 1971. No. 37801.

1. **Criminal Law: Appeal and Error: Evidence.** It is not the province of the Supreme Court to pass on the credibility of witnesses or weigh the evidence in a criminal case.
2. **Criminal Law: Automobiles: Trial.** The possibility that a stolen truck might be abandoned later is not a defense to a charge of auto theft.
3. **Criminal Law: Burglary: Words and Phrases.** A trailer which is used as an office may be the subject of a burglary under section 28-532, R. R. S. 1943.
4. **Criminal Law: Trial: Instructions.** In the absence of a request, the trial court is not required to instruct in regard to lesser included offenses.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from convictions for burglary and auto theft. His principal assignments of error relate to the sufficiency of the evidence to sustain the convictions on each charge.

There was evidence from which the jury could find that the office of the Delight Wholesale Company in Omaha, Nebraska, was burglarized at about 2 a.m., on September 1, 1969, and a safe carried away in a 1959 pickup truck stolen from Dwight Godden. The office was equipped with a security alarm which resulted in the police being notified promptly of the break-in.

At 2:17 a.m., a police officer observed the Godden truck traveling north on Thirty-third Street near Lake Street with its headlights turned off and the safe in the back of the truck. The truck was found parked in front of 3224 Willis Avenue a few minutes later. As the police approached, the defendant ran from the left side of the truck. The defendant was then apprehended and taken to the police station.

The truck had been "hot wired" so that it could be operated without an ignition key. A guitar that had been taken from the office of the Delight Wholesale Company was found in the back of the truck, and a pry bar was lying on the right running board. The pry bar fitted into the marks that had been made where the door at the Delight Wholesale Company had been forced.

The evidence which has been summarized, although circumstantial, was sufficient for the jury to find that the defendant had participated in the theft of the Godden truck and the burglary at the Delight Wholesale Company. It is not the province of this court to pass on the credibility of witnesses or weigh the evidence in a criminal case.

The circumstances indicate that the truck was stolen

for the purpose of transporting the safe which was interrupted when the police happened to see the truck with the safe at Thirty-third and Lake Streets. There is nothing in the record to suggest there was any intention to return the truck to its owner. The possibility that the truck might be abandoned after it was no longer needed to haul the safe would not be a defense to the charge of auto theft. See, Sizemore v. State, 5 Md. App. 507, 248 A. 2d 417; State v. Langis, 251 Ore. 130, 444 P. 2d 959; State v. Fairbanks, 140 Mont. 243, 370 P. 2d 497; Crouse v. State, 229 Miss. 15, 89 So. 2d 919.

The office of the Delight Wholesale Company was located in a trailer. The interior, which was 12 feet by 60 feet, had been divided into three offices and a cashier's cage. A fiber glass skirt had been placed around the base of the trailer, and wrought iron stairs erected at the entrance. The trailer was wired for electricity and equipped with a burglar alarm.

The fact that the office was located in a trailer was of no importance under the circumstances in this case. The jury could find that the trailer was in fact a building. Furthermore, section 28-532, R. R. S. 1943, specifically provides that an "office" may be the subject of a burglary.

There was no request for an instruction as to any lesser included offense. In the absence of a request, the trial court is not required to instruct in regard to lesser included offenses. State v. Caha, 184 Neb. 70, 165 N. W. 2d 362.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE SAXON, APPELLANT.
190 N. W. 2d 854

Filed October 15, 1971. No. 37805.

1. **Criminal Law: Guilty Plea.** The standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant.
2. **Criminal Law: Incompetent Persons: Sentences.** No person who as a result of mental disease or defect lacks capacity to understand the proceeding against him shall undergo sentence for commission of an offense so long as such incapacity endures.
3. **Criminal Law: Incompetent Persons: Hearing: Sentences.** It is discretionary with the district court to hold a hearing sua sponte on the mental competency of a defendant to undergo sentence for commission of an offense.
4. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Lawrence Saxon pleaded guilty, and the district court imposed a consecutive sentence. He appeals. The district court, he contends, erred in failing to hold a hearing sua sponte on his mental competency at the plea and sentencing hearings. Excessiveness of the sentences is also asserted.

On January 26, 1970, Sergeant Holewinski of the Omaha police department arrested Saxon and George Woods in their room. Another officer, Sergeant Volcek,

stood at the entrance. Saxon suddenly grasped a hidden pistol which he aimed at Holewinski, and Woods disarmed the captive. Volcek, in fleeing for assistance, purposely dropped his service revolver in the street near a door of the squad car.

Saxon and Woods, holding Holewinski hostage, ordered him to occupy the driver's seat of the squad car. In the back seat each man pointed a weapon at Holewinski. Volcek approached the car upon demand of the two men, who noted that he was unarmed. At the car he retrieved his service revolver with which he killed Woods. Holewinski's revolver, held by Woods, discharged, and the shot wounded Volcek. Saxon surrendered without firing.

Saxon, age 23, was held in jail until a date subsequent to his plea and sentencing hearing in June 1970. Competency of his private counsel, Samuel P. Caniglia, now a district judge by appointment under the merit plan for judicial selection, is undisputed. He called Saxon's mother to testify, and he introduced reports of two psychiatrists in evidence. He did so, however, to mitigate punishment—not to suggest mental incompetency of Saxon.

Saxon's mother testified that death of the father 9 years earlier had affected the son. Symptoms were withdrawal, absences from school, violent temper, and sudden changes to extreme tranquility.

Dr. J. L. Bodig wrote Caniglia on May 21, 1970, regarding an examination requested by Caniglia: ". . . (Saxon's) thought associations were somewhat loose but he was able to maintain a fairly continuous conversation. There was no evidence of blocking . . .. His sensorium was clear and he is well oriented to time, person, and place. . . . Diagnostically . . . (Saxon) is suffering from a chronic undifferentiated schizophrenic reaction. . . . his interpretation of reality is quite tenuous and undoubtedly at times becomes dissociated from reality. He has marked psychopathic tendencies. . . ."

Dr. C. H. Farrell reported his examination of Saxon on January 29, 1970: ". . . (Saxon) is a chronic psychopathic personality in an inadequate individual who shows no evidence of psychosis at this time. . . . DIAGNOSIS: No evidence of frank psychosis found. Psychopathic Personality."

Saxon had little formal education beyond grade 11. He had been convicted of misdemeanors but no felony. The Air National Guard discharged him honorably.

The information charged four counts respectively as follows: Kidnapping, robbery, use of firearm in commission of felony, and assault with intent to murder. Saxon pleaded guilty to the last three counts, and the prosecution dismissed Count I. The court sentenced Saxon to imprisonment for 25 years on Count II; for 3 to 10 years on Count III, to be consecutive; and for 15 years on Count IV, to run concurrently with the sentence on Count II.

The standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant. State v. Cruse, *ante* p. 331, 190 N. W. 2d 629.

No person who as a result of mental disease or defect lacks capacity to understand the proceeding against him is to undergo sentence for commission of an offense so long as such capacity endures. See § 29-1822, R. R. S. 1943. Cf. Pate v. Robinson, 383 U. S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); Bishop v. United States, 350 U. S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956); Model Penal Code, Proposed Official Draft, § 4.04, p. 68 (1962).

It is discretionary with the district court to hold a hearing sua sponte on the mental competency of a defendant to undergo sentence for commission of an offense. State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766 (1971).

On competency the district court might consider not only the psychiatric reports but also the position of Caniglia. He had requested at least one report. His

investigation, reputation, and ability might properly lead a court to conclude that Caniglia had delved into the point. The court, in not holding a competency hearing sua sponte, acted well within its discretion.

The sentences are hard, but the conduct of Saxon after the arrest was grievous. True, he fired no shot, but he initiated the train of events in which Volcek was wounded. Social defense demands special protection for law enforcement officers in line of duty. A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion. State v. Holoubek, 187 Neb. 163, 188 N. W. 2d 439 (1971). There was no abuse here.

AFFIRMED.

VERN E. BOLE, APPELLANT, V. S.M.S. TRUCKING COMPANY, APPELLEE.
190 N. W. 2d 780

Filed October 15, 1971. No. 37896.

1. **Workmen's Compensation: Negligence.** When an employee's injuries are caused by his willful negligence, he may not recover compensation.
2. **Workmen's Compensation: Appeal and Error.** On appellate review of a workmen's compensation case in the Supreme Court, it will not be considered de novo if the findings of fact are supported by the evidence.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Kenneth P. Weiner and Stern, Harris, Feldman, Becker & Thompson, for appellant.

Edwin Cassem of Cassem, Tierney, Adams & Henatsch, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Plaintiff, a truck driver, was stopped by a deputy sheriff and charged with violating traffic regulations. Although the evidence is conflicting, it is ample to sustain a finding that plaintiff wrongfully assaulted the deputy sheriff and, as a consequence, was shot and received the injuries for which he seeks to recover.

The only assignment of error is in regard to the sufficiency of the evidence to sustain the finding and judgment of the trial court.

When an employee's injuries are caused by his willful negligence, he may not recover compensation. See § 48-110, R. R. S. 1943.

On appellate review of a workmen's compensation case in the Supreme Court, it will not be considered de novo if the findings of fact are supported by the evidence. See Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285.

The findings of fact and the judgment entered by the trial court are supported by the evidence adduced and the judgment is affirmed.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE, V. EARL B. SELDERS ET AL., APPELLANTS.
190 N. W. 2d 789

Filed October 15, 1971. No. 37902.

1. **Insurance: Automobiles: Words and Phrases.** In an automobile liability insurance policy, the word household in an omnibus clause extending the liability available to insured to other members of the household means those who dwell under the same roof and compose a family.
2. **Reformation of Instruments: Equity: Evidence.** Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the well-known rule of equity that the evidence must be

clear, convincing, and satisfactory, and, in consequence, deny a reformation.

3. **Damages: Death: Parent and Child.** The measure of damages in an action for the wrongful death of a minor child is the pecuniary loss which the parent sustains by reason of being deprived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching his majority.
4. **Damages: Death: Actions.** Medical or funeral expenses resulting from a wrongful death are recoverable as damages in an action under sections 30-809 and 30-810, R. R. S. 1943, when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses and may be recovered in a separate cause of action.
5. **Statutes: Insurance: Automobiles.** Section 60-509.01, R. R. S. 1943, requires uninsured motorist insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.
6. ———: ———: ———. It is the purpose of section 60-509.01, R. R. S. 1943, to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose.

Appeal from the district court for Madison County: MERRITT C. WARREN, Judge. Affirmed in part, and in part reversed and remanded.

George H. Moyer, Jr., of Moyer & Moyer, for appellants.

Deutsch & Hagen and Thomas H. DeLay, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action under the Uniform Declaratory Judgments Act wherein plaintiff seeks to be relieved of liability under an insurance policy issued to defendant Earl B. Selders. Judgment was entered for plaintiff in the district court. We reverse that judgment in part.

Plaintiff issued to Earl B. Selders a policy of insurance

on an automobile jointly owned by Earl B. Selders and his wife Ila Selders. The policy provided for uninsured automobile coverage but limited persons so insured as follows: "The unqualified word 'insured' means

"(1) the first person named in the declarations and while residents of his household, his spouse and the relatives of either;

"(2) any other person while occupying an insured automobile; and

"(3) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies."

After issuance of the policy, Earl and Ila Selders separated and lived in separate establishments. A divorce decree was entered awarding the minor children to Ila until further order of the court and requiring Earl to pay for their support. Earl also had visitation privileges. The decree was entered on October 10, 1966, and before it became final, three of the children died as the result of an accident which occurred on February 3, 1967. The children were passengers in an uninsured automobile involved in a one-car accident. The only question presented is whether damages sustained were covered by the policy at the time of the accident. Plaintiff contends that they were not because the children were not then members of their father's household and he was the only named insured.

It is apparent that after the separation of their parents, the children, residing with their mother, were members of her household and had ceased to be members of their father's household as he had moved out and was living elsewhere. "In an automobile liability insurance policy, the word 'household' in an omnibus clause extending the liability available to assured to other members of the household means 'Those who dwell under the same roof and compose a family.'" Andrews v. Commercial Casualty Ins. Co., 128 Neb. 496, 259 N. W. 653.

Defendants have asked for reformation of the policy

to include Ila Selders as a named insured. This was denied in the district court and we concur that defendants are not entitled to reformation. Without attempting to detail the lengthy evidence submitted on this point, suffice it to say that defendants have failed to meet the required burden of proof. "In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.

"Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the well-known rule of equity that the evidence must be clear, convincing and satisfactory, and, in consequence, deny a reformation." Beideck v. National Fire Ins. Co., 139 Neb. 171, 296 N. W. 873. See, also, Du Teau Co., Inc. v New Hampshire Fire Ins. Co., 156 Neb. 690, 57 N. W. 2d 663.

Since Ila Selders was not a named insured and not a member of the household of Earl B. Selders, she is not an additional insured and has no standing such as would permit her to recover under the policy issued by plaintiff. Likewise, the children were not additional insureds and had one been injured rather than killed, such child could not have recovered under the policy. The fact that the children were no longer members of their father's household would appear, at first glance, to bar recovery by the father. We do not so find. The wrongful death statute, section 30-810, R. R. S. 1943, permits recovery by the parents for the wrongful death of an unmarried minor without issue. This ordinarily entails recovery for services and contributions by the minor both before and after attaining majority. "The meas-

ure of damages in an action such as we have before us is the pecuniary loss which the parent sustains by reason of being deprived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching his majority." Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544. See, also, Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. This is also true of medical and funeral expenses. "Medical or funeral expenses resulting from a wrongful death are recoverable as damages in an action under sections 30-809 and 30-810, R. R. S. 1943, when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses and may be recovered in a separate cause of action." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

In view of the foregoing, it is clear that Earl B. Selders was legally entitled to recover damages from the uninsured motorist for the death of his children, assuming, as we must for the purposes of this action, that the uninsured motorist was at fault. The policy commits plaintiff: "To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured; * * *." It then proceeds to define "insured" as hereinabove set forth. The foregoing clause tends to limit recovery for bodily injury to injuries sustained by one insured. We have found that the children were not members of their father's household and therefore not listed as "insured" under provision (1). Provision (2) is not applicable. Provision (3) would appear to be meaningless if limited to injuries sustained by the insureds mentioned in provisions (1) and (2). It apparently was intended to comply with the statutory requirement found in section 60-509.01, R. R. S. 1943, which requires uninsured motorist insurance "for the protection of *persons insured thereunder who are legally entitled to*

recover damages from owners or operators of uninsured motor vehicles, * * *." (Emphasis supplied.) As pointed out, Earl B. Selders, as the father, is legally entitled to recover damages for the death of his children *and he is an insured.* Provision (3) adds an additional category of "insured." It provides not only for recovery for *injuries* sustained by an insured but also for the recovery of other consequential damages which an insured is legally entitled to recover from an uninsured motorist.

It is stated in Sterns v. M.F.A. Mutual Insurance Co. (Mo. App.), 401 S. W. 2d 510, 26 A. L. R. 3d 919: "The consistent tenor of legal authority we have examined, including the hereinabove quoted, and the clear intendment of the compulsory statutes therein referred to, are that *uninsured motorist coverage in its standard form includes indemnity to such survivors of deceased victims of uninsured automobiles as are legally entitled to sue for damages under wrongful death statutes*—without regard to whether the coverage is provided under compulsion by statute or by voluntary contract." This court stated in Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133: "A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose." Statutory requirements must be complied with by insurers and if the policy issued fails in this respect, the statute will be read into the policy. See Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179.

As we view the situation, Ila Selders personally has no right to recover from plaintiff. The administrator and administratrix of the estates of the three deceased children have a right of recovery for damages sustained by Earl B. Selders, the father of the children, but are not entitled to recover for damages sustained by the mother Ila Selders. Insofar as the judgment of the district court denied recovery of damages sustained by Earl B. Selders, the judgment is reversed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP RUSSO, APPELLANT.

190 N. W. 2d 853

Filed October 15, 1971. No. 37913.

1. **Criminal Law: Self-Incrimination.** An accused without counsel and in custody for interrogation may effectively waive his privilege against self-incrimination without receiving Miranda warnings.
2. **Criminal Law: Trial.** Among intervals ordinarily to be excluded in computation of time for a speedy trial are delay resulting from (1) other proceedings concerning defendant or (2) a continuance granted at the request or with the consent of defendant.
3. **Criminal Law: Trial: Instructions.** If the court has instructed the jury generally on the law and has not withdrawn any essential issue from consideration by the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

William L. Walker, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

An information charged that Phillip Russo during his confinement in the Nebraska Penal and Correctional Complex had assaulted and struck Leo M. Amen. A jury found him guilty. He appeals and assigns errors relating to voluntariness of admissions, right to speedy trial, and a jury instruction on self-defense.

Preliminary to in-custody interrogation of Russo by a lieutenant of the Nebraska State Patrol, on August 28, 1969, the lieutenant commenced to deliver Miranda warnings. Russo, interrupting, spontaneously volunteered that he had struck Amen. Although that evidence differed from testimony by Russo, and no one had taken stenographic notes, it sufficed to support findings by court and jury against him. An accused without counsel and in custody for interrogation may effectively waive his privilege against self-incrimination without receiving Miranda warnings. See, State v. Perez, 182 Neb. 680, 157 N. W. 2d 162 (1968); United States v. Barnhill, 429 F. 2d 340 (8th Cir., 1970).

The offense occurred on August 27, 1969, but trial did not commence until November 2, 1970. The delay was due to (1) hand-lettered motions signed by Russo but not by his counsel, (2) confinement of Russo in a hospital for psychiatric treatment from January to June 1970, and (3) agreement of counsel to a continuance.

Violation of the right to a speedy trial is not necessarily determinable by passage of time alone. Among intervals ordinarily to be excluded in computation of time for a speedy trial are delay resulting from (1) other proceedings concerning defendant or (2) a continuance granted at the request or with the consent of defendant. See A.B.A., Standards Relating to Speedy Trial, § 2.3 (Approved Draft, 1968). Russo was given a speedy trial.

On self-defense, jury instruction No. 8 embodied the

substance of the standard form. See NJI No. 14.33 (1969). Russo argues that State v. Goodseal, 186 Neb. 359, 183 N. W. 2d 258 (1971), which decided the Self-Defense Act of 1969 was unconstitutional, rendered the instruction erroneous. He requested no different instruction. Indeed he does not specify the nature of the asserted error in the court's instruction.

If the court has instructed the jury generally on the law and has not withdrawn any essential issue from consideration by the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining. State v. Ford, 186 Neb. 109, 180 N. W. 2d 922 (1970).

The judgment is affirmed.

AFFIRMED.

EVELYN M. MICHAELIS, APPELLEE, V. NORMAN A. MICHAELIS, APPELLANT.
190 N. W. 2d 783

Filed October 15, 1971. No. 37921.

1. **Judgments: Trial: Appeal and Error.** Where a default has been regularly entered, it is within the discretion of the trial court as to whether a default judgment shall be set aside. In the absence of a showing of an abuse of discretion this court will not interfere.
2. **Judgments: Pleadings: Trial.** The facts and circumstances in each case determine whether there has been an abuse of discretion. Among the matters to be considered are the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice.

Appeal from the district court for Gage County: WILLIAM F. COLWELL, Judge. Affirmed.

Mattson, Ricketts, Gourlay & Lewis, for appellant.

Dalke & Carlson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from an order overruling his motion to set aside and vacate a default judgment entered against him in a divorce proceeding.

The action was commenced on September 4, 1968, and a summons was served in person upon the defendant on that date. Answer day was October 7, 1968. On November 19, 1968, counsel for the defendant filed a motion to require the plaintiff to make her petition more definite and certain.

On October 31, 1969, approximately 1 year later, the defendant's counsel asked leave to withdraw as counsel for the defendant, alleging that the defendant refused to answer correspondence or contact his counsel. Leave to withdraw was granted, and a copy of the order was mailed to the defendant at Wymore, Nebraska. On November 4, 1969, the trial court ordered the defendant's motion be set for hearing on November 14, 1969. A copy of this order was mailed to the defendant at Wymore, Nebraska, but the letter was returned to the clerk of the district court endorsed: "Moved & left no address."

The defendant's motion was heard and overruled on November 14, 1969, and the defendant was given through December 4, 1969, to plead further. A copy of this order was mailed to the defendant at Wymore, Nebraska. The defendant admits that he saw a copy of this order on or about December 7, 1969. The letter had been delivered to the home of the defendant's son, Gordon, in Wymore, Nebraska, and was delivered to the defendant personally by Gordon's wife. She testified that she read the order to the defendant at that time.

On December 19, 1969, no further appearance having been made, the trial court found that the defendant was in default and entered judgment granting the plaintiff

a divorce, custody of two minor children, certain property, alimony, and child support.

On June 18, 1970, 6 months later, the defendant filed his motion to vacate and set aside the judgment entered on December 19, 1969.

Where a default has been regularly entered, it is within the discretion of the trial court as to whether a default judgment shall be set aside. Morgan v. Weiner, 173 Neb. 715, 114 N. W. 2d 720. In the absence of a showing of an abuse of discretion this court will not interfere.

The facts and circumstances in each case determine whether there has been an abuse of discretion. Among the matters to be considered are the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice. Commercial Sav. & Loan Assn. v. Holly Development, Inc., 182 Neb. 335, 154 N. W. 2d 510.

The defendant's motion to vacate was not filed until the last day of the 6-month period prescribed by section 42-340, R. R. S. 1943. The defendant, however, testified that he was represented by a lawyer in November and December 1969 and that he talked with his present counsel before Christmas in 1969. The delay in filing the motion to vacate is unexplained in the record.

The defendant claims fraud on the part of the plaintiff in failing to disclose to the trial court that she knew where the defendant was living in December 1969. This contention is based upon a telephone conversation between the parties on November 9, 1969, after the defendant's son had visited him for 3 days in Omaha, Nebraska. Perhaps the plaintiff could have made a more complete disclosure of what information she had as to where the defendant might be living, but the fact remains that the order of November 14, 1969, which was mailed to Wymore, Nebraska, reached the defendant and he knew the contents of the order not later than December 7, 1969.

The order of November 14, 1969, was sufficient notice to the defendant that he would be in default after December 4, 1969, unless a further appearance was made. In the absence of a further appearance the trial court could proceed without additional notice to the defendant.

As we view the record, it fails to show that the trial court abused its discretion in refusing to vacate and set aside the judgment entered by default. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ODELL FORD, APPELLANT.
190 N. W. 2d 787

Filed October 15, 1971. No. 38025.

1. **Criminal Law: Constitutional Law: Evidence.** A conviction obtained through the use of false testimony, known by the State to be such, is in violation of the Fourteenth Amendment to the Constitution of the United States.
2. **Criminal Law: Evidence: Witnesses: Trial.** The resolution of conflicts and inconsistencies in the testimony of a witness is a question of fact for the jury and it is the jury's function to determine which, if any, of the inconsistent statements of a witness is true.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Odell Ford, pro se.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a post-conviction proceeding. Defendant charges that his conviction on a charge of manslaughter resulted from perjured testimony knowingly used with the connivance of the court, the county attorney, and

the public defender. The district court denied an evidentiary hearing and dismissed defendant's motion. We affirm the judgment of the district court.

Defendant's entire motion is based on the fact that a witness had made, prior to trial, certain statements conflicting with her testimony. This was known to defendant and his attorney at the time of trial, was brought out on cross-examination of another witness, and the circumstances fully presented to the jury.

A conviction obtained through the use of false testimony, known by the State to be such, is in violation of the Fourteenth Amendment to the Constitution of the United States. See, Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217; Miller v. Pate, 386 U. S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690.

"The resolution of conflicts and inconsistencies in the testimony of a witness is a question of fact for the jury and it is their function to determine which, if any, of the inconsistent statements of a witness is true." 23A C. J. S., Criminal Law, § 1138d, p. 345. See, also, Hynes v. State, 115 Neb. 391, 213 N. W. 347.

In the present case, the conflicting statements of the witness were known to the jury. It was simply a question of credibility which the jury, in full possession of the facts, resolved.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCISCO M. JUAREZ, APPELLANT.
190 N. W. 2d 858

Filed October 22, 1971. No. 37892.

1. **Sodomy: Trial: Evidence.** In a sex crime, testimony on direct examination concerning a victim's complaint should be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not

proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae.

2. ———: ———: ———. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is generally admissible as an exception to the hearsay rule, whether it be treated as part of the res gestae or as a spontaneous declaration or excited utterance.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant was charged on separate counts with the crimes of sodomy and assault with intent to do great bodily harm. He was found guilty of sodomy by the jury, but the jury was unable to reach a verdict on the assault count. Sentence on the sodomy conviction was entered, and this appeal followed.

The victim was a 15-year-old runaway from the Whitehall Home in Lincoln, Nebraska. He met the defendant, Francisco Juarez, in Omaha on July 1, 1970. The victim accompanied Juarez to a pool hall and later to Juarez' apartment where he spent the night. The victim testified that Juarez committed sodomy upon him that night and on the three succeeding nights. He continued to stay with Juarez. On the evening of July 5, 1970, the victim and the defendant were in the defendant's apartment with another unidentified male adult and two other teenage boys. All of them had removed their clothing except for undershorts. There was some evidence of drinking by the defendant. The boys testified that

at times the defendant kissed and patted their legs and buttocks. Later, the defendant began to beat the unidentified adult, who fled. Still later, defendant began to beat the victim and the two other boys fled. These two notified the police and accompanied them back to the defendant's apartment. The defendant and the victim were in the apartment. The victim was beaten, bleeding, and crying. The officers arrested the defendant and took the victim to a hospital, and later to the police station. The victim made complaints or statements to a police officer at each location. The statements were both made by the victim within an hour and a half to two hours from the time the police found him. To some extent, the statements were in answer to questions of the officers. Both officers testified that the victim was in an emotional or excitable state.

The complaints or statements made by the victim to the officers were essentially summary statements of what crimes were committed, where, when, and by whom. The victim was the first witness at the trial. The two other boys and three police officers also testified. The evidence of these witnesses, while circumstantial as to sodomy, generally corroborated the testimony of the victim in all other respects. The victim's complaints to the police officers were fully consistent with the testimony which he gave at the trial.

The assignments of error center around the admission of the complaints or statements made to the police officers by the victim. The defendant claims that this testimony was inadmissible hearsay and was not a part of the res gestae.

Nebraska has traditionally followed the common law rule that in a sex crime, the fact that complaint was made is admissible but not its details. This rule, while related to exceptions to the hearsay rule, is still grounded on different considerations. Although issues have been intermingled, we have held that in a sex crime, testimony on direct examination concerning a victim's complaint

should be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. See, Peery v. State, 163 Neb. 628, 80 N. W. 2d 699; State v. Chaney, 184 Neb. 734, 171 N. W. 2d 787.

Concepts of res gestae have been indistinct and interpretation has been sometimes confusing. Most of the present exceptions to the hearsay rule evolved from early explanations in terms of res gestae. The obvious trend of the cases is toward a widening of the admission of spontaneous statements and a narrowing of the operation of the hearsay rule.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is generally admissible as an exception to the hearsay rule, whether it be treated as part of the res gestae or as a spontaneous declaration or excited utterance. See, generally, McCormick, Law of Evidence, § 272, pp. 578 to 584; United States v. Fountain, 449 F. 2d 629 (8th Cir., September 28, 1971); State v. Chaney, *supra;* Rule 8-03(b)(2), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates.

Determination of admissibility generally rests within the sound discretion of the trial court. See, VI Wigmore on Evidence (3d Ed.), § 1757, p. 166; Roberts v. United States, 332 F. 2d 892 (8th Cir., 1964).

The defendant objected to the police officers' testimony as to the victim's complaints on the ground that it was hearsay. The trial court properly overruled those objections. Even assuming that the foundation for admission of the victim's complaints to the police was inadequate, we cannot see how the testimony prejudiced the defendant. The victim's oral testimony at trial was completely consistent with his out-of-court statements,

and both the declarant and those who heard the statements were subject to cross-examination.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD MASEK, APPELLANT.

190 N. W. 2d 861

Filed October 22, 1971. No. 37924.

Trial: Evidence: Witnesses. Where a question is asked of a witness, and his answer, which is responsive to the question, is received without objection, and motion is then made by counsel to strike out such evidence on the ground of its incompetency, it is discretionary with the court whether it will sustain the motion or not.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Douglas McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an appeal from a conviction for operating a motor vehicle while under the influence of alcoholic liquors. Defendant asks for reversal on the ground that evidence of a blood test was improperly received. We affirm the judgment of the district court.

The State placed on the witness stand the individual who analyzed the blood sample taken from defendant. The witness was questioned and answered as follows:

"Upon the analysis or analyzing of the sample, what result did you obtain?

"The amount of alcohol in the blood was sixteen hundredths per cent."

No objection was made to the question, but after it had been answered, the defendant moved to strike the answer so that he could interpose the objection that there was not a sufficient foundation shown. The motion was overruled. The State concedes that the statutory requirements for the admission of evidence as to the result of the blood test were not fully complied with. Defendant failed to give any reason or excuse for failure to object before the question was answered.

We believe that courts should not deal arbitrarily with such situations as a lawyer's attention may at times be momentarily diverted or he may for other reasons fail to hear the question asked. No such situation appears here and it is the general rule that a party cannot reserve his objection to a question calling for incompetent testimony until the answer of the witness has been received. It is then discretionary with the court whether it will, or will not, sustain the motion. See, Dunn v. State, 58 Neb. 807, 79 N. W. 719; Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682; State v. Todaro, 131 N. J. Law 430, 37 A. 2d 73; State v. Bryan, 69 Ohio App. 306, 43 N. E. 2d 625; Soucie v. State, 218 Ind. 215, 31 N. E. 2d 1018; Commonwealth v. Doyle, 323 Mass. 633, 84 N. E. 2d 20; People v. Abbott, 47 Cal. 2d 362, 303 P. 2d 730. The present record does not reflect an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD HAMILTON, APPELLANT.
190 N. W. 2d 862

Filed October 22, 1971. No. 37927.

1. **Guilty Plea: Venue.** A plea of guilty, voluntarily entered, waives any objection to the overruling of a motion for a change of venue.

2. **Constitutional Law: Bail and Recognizance.** Article I, section 9, Constitution of Nebraska, renders murder a nonbailable offense where the proof is evident or the presumption great.

Appeal from the district court for Dixon County: JOSEPH E. MARSH, Judge. Affirmed.

Robert G. Scoville of Ryan & Scoville and P. F. Verzani, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant was charged with murder in the first degree and subsequently entered a plea of guilty to murder in the second degree. He now contends that the plea entered was not voluntary. We affirm the judgment of the district court.

Defendant asserts that two factors render his plea involuntary: First, the denial of a change of venue; and second, the denial of bail. The theory apparently is that these factors overwhelmed this 18-year-old defendant to the extent that, notwithstanding he was in touch with his parents and his attorney, he was thereby induced to plead guilty to the lesser charge. We are at a complete loss to understand how these factors could bring about an involuntary plea. Furthermore, at the time defendant entered his plea of guilty and was sentenced, he assured the court that he fully understood the reduction of the charge to second degree murder and the penalty, was acting freely and voluntarily without any promises or threats, and that he had discussed the matter with his parents and his attorney.

It further appears that in the eyes of the law, defendant was not the victim of any injustice. A plea of guilty, voluntarily entered, waives any objection to the overruling of a motion for a change of venue. See State

v. Burnside, 185 Neb. 234, 175 N. W. 2d 1. Article I, section 9, Constitution of Nebraska, renders murder a nonbailable offense "where the proof is evident or the presumption great." In the present case, the circumstances surrounding the offense not only raised a positive presumption of guilt but were practically conclusive.

We are unable to note any error in the record before us and are necessarily constrained to affirm the judgment of the district court.

AFFIRMED.

LA VERN ZADINA, APPELLANT, V. C. L. WEEDLUN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
190 N. W. 2d 857

Filed October 22, 1971. No. 37957.

1. **Appeal and Error: Evidence: Courts.** Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of facts rather than the other.
2. **Intoxicating Liquors: Implied Consent Law.** The failure of an officer to advise a motorist subjected to a breath or body-fluid test for intoxication that he could obtain an additional test following that administered at the direction of the officer does not excuse the motorist's failure to submit to such test.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Barney & Carter, Herbert M. Brugh, and David W. Stempson, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an appeal from an order of the district court affirming an order of the Director of Motor Vehicles suspending the motor vehicle operator's license of La Vern Zadina, appellant. The basis of the order was the refusal of appellant to take a body-fluid test subsequent to his arrest for operating a motor vehicle while under the influence of alcoholic liquor. We affirm the judgment of the district court.

Appellant raises two questions. He denies that he was ever requested to take the test. The evidence on this point was conflicting but was sufficient to sustain the finding of the district court. Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of facts rather than the other. See Hooper v. City of Lincoln, 183 Neb. 591, 163 N. W. 2d 117.

Appellant also urges that the judgment must be reversed because the arresting officer failed to inform him that he could have a physician of his own choice evaluate his condition and perform additional tests. Section 39-727.04, R. R. S. 1943, provided: "The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer. If the officer shall refuse to permit such additional test to be taken, then the original test shall not be competent as evidence." The statute confers a privilege upon the person to be tested but does not require the officer to inform him of the privilege. The failure of an officer to advise a motorist subjected to a breath or body-fluid test for intoxication that he could obtain an additional test following that administered at the direction of the officer does

not excuse the motorist's failure to submit to such test. See, Kesler v. Department of Motor Vehicles, 1 Cal. 3d 74, 81 Cal. Rptr. 348, 459 P. 2d 900, Cert. Den., 397 U. S. 989; Holland v. Parker, 84 S. D. 691, 176 N. W. 2d 54.

Appellant's contentions are without merit and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD LEO FRANKLIN, APPELLANT.
190 N. W. 2d 780

Filed October 22, 1971. No. 37990.

Appeal and Error: Post Conviction. A defendant who has appealed his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Larry W. Myers, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

This is an action for post conviction review of a conviction for robbery. Appellant contends that in-court identification evidence was wrongfully admitted due to previous allegedly illegal line-up procedures. We affirm the judgment of the district court sustaining appellant's conviction.

The conviction of appellant was affirmed on appeal to this court. On that appeal the identical issues now relied upon were presented and determined adversely to

appellant. See State v. Franklin, 185 Neb. 62, 173 N. W. 2d 393.

A defendant who has appealed his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure. See, State v. Parker, 180 Neb. 707, 144 N. W. 2d 525; State v. Newman, 181 Neb. 588, 150 N. W. 2d 113.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

IN RE ESTATE OF VIVIAN M. NEIL, DECEASED.
STANLEY R. NEIL, SURVIVING HUSBAND, APPELLANT, V.
AUDREY MASTERSON ET AL., APPELLEES.
191 N. W. 2d 448

Filed October 29, 1971. No. 37903.

1. **Adoption: Descent and Distribution: Statutes: Parent and Child.** Adoption and the right to take property by descent or inheritance are strictly statutory and exclusively within the legislative control.
2. ———: ———: ———: ———. Nebraska, recognizing the humanitarian aspects and purposes of the adoption statutes, gives them a liberal rather than a strict construction.
3. ———: ———: ———: ———. Section 43-110, R. R. S. 1943, must be construed together with the statutes of descent and distribution.
4. ———: ———: ———: ———. It is the intention of our statute that the next of kin of adoptive parents shall have the same right to inherit property from an adoptive child as they would from a natural child of said adoptive parents.

Appeal from the district court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

Henry F. Reimer, Leo M. Williams, Deutsch & Hagen, and Thomas H. DeLay, for appellant.

Burbridge & Burbridge, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This case involves a question as to the inheritance of that portion of the estate of Vivian M. Neil, deceased, remaining after setting over to the surviving husband the property assignable under sections 30-103 and 30-101(4), R. R. S. 1943. The surviving spouse claims it should be assigned to him rather than to 21 nieces and nephews of the deceased's adoptive mother. The trial court assigned the property to the nieces and nephews. We affirm.

Deceased died intestate in Knox County, Nebraska, May 4, 1967, survived by her husband, the appellant herein, leaving an estate consisting of personal property of a value in excess of $50,000. The decedent, who was predeceased by her adoptive parents, left no issue, nor children of deceased issue, and no adoptive brother or sisters. The only surviving adoptive heirs are the 21 adoptive cousins.

Deceased had been adopted under a decree entered on the 13th day of August 1918. The adoption decree, which was without restriction, changed the name of decedent to Vivian Margery Smith, and provided that she would be entitled to all the rights and privileges, and subject to all the obligations of a child begotten by her adoptive parents in lawful wedlock.

Do adoptive cousins of a deceased inherit the same as cousins of the blood, under section 30-101, R. R. S. 1943? Adoption was unknown to the common law. It is strictly a creature of statute. So, also, is the right to take property by descent or inheritance. Such matters, therefore, are exclusively within legislative control.

The statutes covering adoption and descent and distribution of all of the states of the Union differ to a greater or lesser extent in their provisions. Reference to adjudicated cases from other states with standards

differing from our own are of little value in construing or interpreting the legislative intent and meaning in the enactment of our own statutes. Generally, however, the right of inheritance of the kin and heirs-at-law of predeceased adoptive parents depends upon the rights vested in the adoptive parents. See Annotation, 170 A. L. R. 742.

Our present statute, section 43-110, R. R. S. 1943, covering the legal consequences of an adoptive child, enacted in 1943, replaced the law enacted in 1897. It reads: "After a decree of adoption is entered, the usual relation of parent and child and *all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.*" (Italics supplied.) The statute previous to the 1943 enactment had remained unchanged from its adoption in 1897. The pertinent provision for comparison purposes was the following: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child, and shall have all the right and be subject to all the duties of that relation, and the parents of such adopted child shall, thereafter stand relieved of all parental duties toward, and all responsibility for, said minor child and shall have no right over it." § 43-109, Comp. St. 1929.

Since 1897, Nebraska has been in the vanguard of those states applying a liberal rather than a strict construction to adoption statutes. In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89, states: "At common law, adoption of heirs or children was unknown. For some time after the enactment of adoption statutes the courts were inclined to their strict construction because they

were said to be in derogation of the common law. Later, the humanitarian aspects and purposes of such statutes were recognized, and the courts generally evinced a disposition to give them a liberal rather than a strict construction. This court has adopted the rule of liberal construction. Ferguson v. Herr, 64 Neb. 659."

The provisions from the statute of descent pertinent to the question presented are the following. Section 30-103, R. R. S. 1943: "(6) the residue, if any, of the personal estate shall be distributed in the same proportions to the same persons as prescribed for the descent of real estate." Section 30-101, R. R. S. 1943, provides that real estate shall descend: "(4) one half to the husband or wife, if there be no children nor the issue of any deceased child or children, surviving; (5) if the deceased leaves relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving; and in the event the deceased leaves no relatives of his or her blood, the residue of the real estate herein provided for shall also descend to the surviving husband or wife."

The following from In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89, is controlling herein: "Much has been said and written upon the natural rights flowing from the ties of kinship, relative to the right of inheritance, but, as we view the question, it is to be determined not as a matter of sentiment but as a matter of law, which has been settled by the law-making power of the state." This language should be read in conjunction with section 43-110, R. R. S. 1943, set out above, particularly the portion italicized.

Appellant's appeal is predicated on his interpretation of the words "blood relative," in the statute of descent. He ignores the language of section 43-110, R. R. S. 1943,

"his, her or their kindred," which must be construed together with the statutes of descent and distribution. Black's Law Dictionary (4th Ed.), p. 1009, defines "kindred" as: "Relation by birth or consanguinity. Relatives by blood." The word "kindred" has a well-established meaning and properly signifies such persons as are related by blood. The language italicized above makes it very evident, particularly in the light of the liberal rather than the strict construction applied in Nebraska to adoption statutes, that it was the legislative intent to provide for reciprocal inheritance rights between the adopted child and the blood relatives of the adoptive parents. This is clearly evident from In re Estate of Taylor, 136 Neb. 227, 285 N. W. 538, in which we said: "The thought back of the Nebraska decisions has been to give exactly the same rights and privileges to an adopted child which a natural child has. One of the rights of a natural child is to inherit from a grandparent through his parent. If the adopted child does not have the right then it has been denied a right or privilege which the natural child has. * * *

"If a grandparent or an uncle, for instance, does not want the child thus adopted to share in his property, it is the easiest thing in the world to cut the child out by a paragraph in his last will. But if such a relative has not availed himself of the opportunity to cut out such person from his estate, it will be understood that the adopted child has the right of representation in exactly the same manner and to exactly the same extent as if such child had been begotten in lawful wedlock. Denton v. Miller, 110 Kan. 292, 203 Pac. 693; In re Cadwell's Estate, 26 Wyo. 412, 186 Pac. 499.

"We hold that the Nebraska statutes, as construed by our decisions, intend that an adopted child shall have the same rights to inherit property that a natural child has; that all the rights and privileges of an adopted child shall be identical with those of a natural child. If our legislature had intended to place any limits upon

such rights and privileges, it could easily have inserted them in the law of descent of property * * *."

We now hold that the language, "all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred," can only mean that it is the intention of our statute that the next of kin of adoptive parents shall have the same right to inherit property from an adoptive child as they would from a natural child of said adoptive parents.

The judgment of the district court is affirmed.

AFFIRMED.

GORDON E. GANKA, DIRECTOR OF RATES AND SERVICES, NEBRASKA STATE RAILWAY COMMISSION, APPELLEE, V. CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, ILLINOIS, APPELLANT.

191 N. W. 2d 438

Filed October 29, 1971. No. 37908.

1. **Public Service Commissions: Carriers.** The Nebraska State Railway Commission is authorized to regulate rates and services and have general control of common carriers within this state as the Legislature may provide by law, and it is not amenable to legislative interruption or limitation of its status or powers except by specific legislation.
2. **Public Service Commissions: Carriers: Appeal and Error.** The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska State Railway Commission. If there is evidence to sustain the findings of the commission, this court cannot intervene.

Appeal from the Nebraska State Railway Commission. Affirmed.

Harry B. Otis of Gaines, Spittler, Neely, Otis & Moore and Christopher A. Mills, for appellant.

Clarence A. H. Meyer, Attorney General, Chauncey C. Sheldon, and John E. Finnigan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

A formal complaint was filed before the Nebraska State Railway Commission charging the railroad with a willful failure to provide reasonably adequate and continuous service on its line from Seward, Nebraska, to Superior, Nebraska. The complaint prayed that a hearing be held and the railroad ordered to repair its facilities and equipment, place its line in a safe operating condition, and provide reasonably adequate and continuous service on the line. After hearing, the commission entered its order requiring the railroad to repair a bridge previously washed out by a flood and to provide at least twice weekly train service from Seward to Superior.

The railroad contends that the power of the commission is circumscribed by statute, and that the enforcement of its orders is limited to those methods and remedies affirmatively and specifically authorized by statute.

The Nebraska State Railway Commission is a constitutional body in this state. A portion of Article IV, section 20, Constitution of Nebraska, provides: "* * * The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The Legislature has also provided that the commission shall have power to regulate the rates and services of, and exercise general control over, all common carriers. See § 75-109, R. R. S. 1943.

Section 75-401, R. R. S. 1943, provides that the commission shall have and exercise jurisdiction over "the

service, facilities, and equipment of all railroad carriers in this state."

The railroad points to the fact that the commission has a specific statutory right to enjoin a common carrier from operating while its equipment, or the manner of its conduct and management, are in an unsafe and dangerous condition. See § 75-115, R. R. S. 1943. This, says the railroad, establishes the legislative intent to limit the commission's enforcement remedies in such cases to an injunction against operation. We cannot agree.

Our constitutional and statutory provisions make it clear that the commission is authorized to regulate rates and services and have general control of common carriers within this state as the Legislature may provide by law, and it is not amenable to legislative interruption or limitation of its status or powers except by specific legislation. See State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502.

At this point, it should be noted also that the Legislature has now removed the foundation stone of the railroad's argument, at least as to future disputes, by amending section 75-115, R. R. S. 1943. That section now affirmatively authorizes the commission not only to enjoin operations of a carrier but to order the carrier to make such reasonable improvements of its service, facilities, and equipment as are necessary. See § 75-115, 1971 Supp.

While the railroad makes the gesture of objection to the sufficiency of the evidence, there is no real question but that the evidence was sufficient to support the order of the commission. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the commission. If there is evidence to sustain the findings of the commission, this court cannot intervene. Ace Gas, Inc. v. Peake, Inc., 184 Neb.

448, 168 N. W. 2d 373. The order of the commission should therefore be affirmed.

After the entry of the order here, the railroad filed an application before the Interstate Commerce Commission for authorization to abandon the railroad line. This matter was not a part of the record before the commission, but has been called to the attention of this court and discussed in the briefs. The commission concedes the proposition that the Interstate Commerce Commission has exclusive and plenary jurisdiction over the abandonment of a branch line of the railroad even though that line is located wholly within a state. See Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. The commission has suggested that it would be appropriate for this court to modify the order by providing that the railroad need not comply until and unless there is a denial of the application for abandonment now pending before the Interstate Commerce Commission. Because of the nature and posture of an appeal from the commission to this court, we deem it inappropriate for this court to enter a modification of the order. Modification may be made at any time by the commission. In the event the commission fails to enter an appropriate modification or attempts to enforce its order prematurely, these matters may be called to the attention of any court having jurisdiction of the enforcement proceedings.

The order of the commission is therefore affirmed.

AFFIRMED.

DALE JEFFREY, APPELLANT, V. FRED RETZLAFF, APPELLEE.
190 N. W. 2d 436

Filed October 29, 1971. No. 37914.

1. **Assumption of Risk: Words and Phrases.** When one knows that a dangerous condition exists, appreciates its dangerous

nature and deliberately exposes himself to such danger, he assumes the risk of injury from it.

2. **Assumption of Risk: Trial.** Ordinarily, questions of negligence, contributory negligence, and assumption of risk are for the jury. However, where the evidence of assumption of risk is so clear that reasonable minds can reach no other conclusion, a directed verdict for the defendant is proper.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. *Affirmed.*

Lloyd I. Bevans, William L. Walker, and Earl Ludlam, for appellant.

M. J. Bruckner of Marti, O'Gara, Dalton & Bruckner, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

In this personal injury action, the district court directed a verdict for the defendant at the close of the plaintiff's evidence and dismissed the case. The plaintiff has appealed. We affirm the judgment of the district court.

At the time of the accident, the plaintiff was a shareholder and an officer employee of J.H.J. Enterprises, Inc., a closely held farm corporation. The defendant, a farmer, was under contract with the corporation to pick, shell, and dry corn. The defendant moved his corn dryer to a farm owned by the J.H.J. Enterprises, and the accident happened in connection with the corn drying operation.

On the morning of the accident, plaintiff arrived on the premises about 8 a.m. and found the defendant attempting to start the tractor. The corn dryer was powered by the defendant's tractor by attaching the power take-off shaft on the tractor to the shaft on the dryer. The defendant had difficulty in starting the tractor and asked the plaintiff to help start it by pulling it

with his truck. The evidence shows that this was an operation that was often necessary with this particular tractor. After starting the tractor, the defendant backed it into the necessary position for connecting the power take-off shaft to the shaft on the dryer. The evidence shows that the power take-off shaft rotated freely while the engine was running, whether or not the power take-off was in gear. The customary procedure in making the hook-up was to stop, take the power take-off out of gear, and then stop the rotation of the shaft by taking hold of the smooth part with the hand. The evidence shows that the plaintiff had observed the defendant doing this on several occasions. On this particular morning, the defendant complained of sore thumbs and asked the plaintiff to make the attachment. At the time of the accident, the defendant was sitting on the tractor and the motor was running.

The plaintiff took hold of the smooth part of the power take-off shaft with his left hand but was unable to stop its rotation. Thinking he could get a better grip, he grabbed the splined part of the shaft with his right hand. Immediately, his glove was caught and his hand whirled around the shaft injuring his thumb so badly that it eventually had to be amputated.

The evidence is undisputed that the plaintiff was 29 years of age, and had lived on a farm and worked with farm machinery for as long as he could remember. He testified he had heard of other people being injured by grabbing a power take-off shaft on the splined end, and concedes he should have known that such an act was dangerous. The evidence indicates, from the testimony of both the plaintiff and the defendant, that the proper method of stopping the shaft was to grasp the smooth portion. Summarizing, the evidence in this case shows that the plaintiff was as fully aware of the danger in grabbing the splined portion of the shaft as the defendant. As recently as Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900, this court has said: "Ac-

tionable negligence does not exist even if no care is exercised to avert a risk to another person subject to such risk if such risk should have been reasonably apprehended by such other person himself." In the above case, this court said as follows: "The plaintiff had been in possession of knowledge of the situation as well as had the defendant, * * *. The plaintiff was in possession of as much information at the time as was the defendant, and voluntarily, so far as the record discloses, took his position of his own accord and volition. * * * The record indicates without controversy that the plaintiff was as fully informed as to cause as was the defendant."

The rotating gear itself warned of engagement. The plaintiff and the defendant both knew that the twisting action could be generated by either the centrifugal motion of oil in the gear case or the actual tooth engagement of the gears. As we have mentioned, the plaintiff himself was completely aware that the grasping of the smooth portion of the shaft was the only way to avoid the obvious danger of grasping the splined portion of the shaft. The plaintiff charges negligence in the failure of the defendant to disengage the power take-off. There is no evidence in the record to support an allegation or finding that the power take-off was engaged or the defendant had knowledge of it.

We have recently said that when one knows a dangerous condition exists, appreciates its dangerous nature and deliberately exposes himself to such danger, he assumes the risk of injury from it. Disney v. Butler County Rural Public Power Dist., 183 Neb. 420, 160 N. W. 2d 757; Fitchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515.

Ordinarily questions of negligence, contributory negligence, and assumption of risk are for the jury. However, where the evidence of assumption of risk is so clear that reasonable minds can reach no other conclusion, a directed verdict for the defendant is proper. The evidence in this case clearly shows assumption of

risk sufficient to bar recovery. The plaintiff knew and comprehended the danger of grasping the splined end of the power take-off shaft and deliberately exposed himself to this danger, which was the proximate cause of the injury.

The district court correctly directed a verdict for the defendant and its judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

FARMERS UNION COOP ASSOCIATION, CEDAR BLUFFS, NEBRASKA, APPELLANT, V. COMMERCIAL STATE BANK, CEDAR BLUFFS, NEBRASKA, APPELLEE.
191 N. W. 2d 168

Filed October 29, 1971. No. 37926.

1. **Principal and Agent: Corporations: Bills and Notes.** An agent is not authorized to endorse commercial paper unless otherwise agreed or the endorsement is usually incident to performance of acts that he is authorized to perform for the principal.
2. **Principal and Agent: Corporations: Bills and Notes: Banks and Banking.** If an agent within his authority receives cash for endorsement and delivery of commercial paper payable to the principal, the payer is not responsible for payment of the amount to the principal or its application to the principal's uses.

Appeal from the district court for Saunders County: H. EMERSON KOKJER, Judge. Affirmed.

Dale D. Kuhlmann and William B. Craig, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Defendant bank exchanged cash over the counter for two checks payable to plaintiff corporation. Plaintiff

claimed the proceeds on the ground of unauthorized endorsements by Lester J. Schulz, its general manager. The district court found generally against plaintiff. The question on appeal is whether the court erred in not finding or concluding that plaintiff had not authorized the transactions.

Only three witnesses testified: Raymond D. Grosse, defendant's vice president and cashier; Edward M. Farr, a director of plaintiff since March 1965 and president since 1968 or 1969; and Vern E. Le Grande, a director and secretary-treasurer of plaintiff at the time of trial in 1970.

A trier of fact might reasonably find as follows: The checks, dated in August 1965 and January 1968 for $573.62 and $695.62 were drawn by Fremont Cake & Meal Co. on a bank other than defendant. On each check Schulz stamped the endorsement "Pay . . . (defendant)." The drawee paid in due course.

Plaintiff in operating its business normally kept cash on hand for unspecified purposes. It maintained an active checking account with defendant. Signature cards authorized withdrawals only by Schulz and certain employees in his name. No resolution or by-law restricted or conferred authority other than the title "general manager" upon Schulz. Each month he submitted a written report of some sort to the president. The books of account were audited annually without certification.

Plaintiff discharged Schulz in March 1969 for undisclosed reasons. No shortage was discovered until some time after his death.

Defendant had no record of the transactions; it had not used cash-in or cash-out slips. Grosse, who had transacted no business with Schulz, an acquaintance, testified: ". . . We cashed many checks for this corporate entity . . .. They had their account there.. . . Funds were also withdrawn by them for cash to operate their business.. . . Q. Do you know whether . . . any . . . cashiers, in fact, were making payment in cash on

checks made payable to the co-op, to . . . Schulz? A. No, sir."

An unauthorized signature on commercial paper is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it. U. C. C., §§ 3-404 (1) and 10-102 (2); see former § 62-123, R. R. S. 1943; 5, Part 1, U. L. A., § 23, p. 224 (1943). The law of agency applies. U. C. C., § 3-403; Bailey, Brady on Bank Checks, § 15.15, p. 502 (4th Ed., 1969).

Authority is the power of the agent to effect legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Manifestation of consent includes acquiescence from which, in light of the circumstances, it is reasonable for another to infer consent. It may be one of several inferences. Restatement, Agency 2d, § 7 (1958).

An agent is not authorized to endorse commercial paper unless otherwise agreed or the endorsement is usually incident to performance of acts that he is authorized to perform for the principal. If within his authority he receives cash for endorsement and delivery of commercial paper payable to the principal, the payer is not responsible for payment of the amount to the principal or its application to the principal's uses. A payee engaged in business ordinarily should deposit collection items for credit to his account. See, U. C. C., § 3-403(1); Geyer v. The Walling Co., 175 Neb. 456, 122 N. W. 2d 230 (1963); Shriver v. Sims, 127 Neb. 374, 255 N. W. 60, 94 A. L. R. 779 (1934); Bailey, Brady on Bank Checks, § 15.15, pp. 504 to 507; Restatement, Agency 2d, §§ 73, 76, and 165, Comment e (1958).

Although evidence of Schulz's authority is exiguous, the district court committed no error in declining to find or conclude that plaintiff had not authorized the transactions.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PHYLLIS KILLS SMALL ET AL., APPELLANTS.
191 N. W. 2d 167

Filed October 29, 1971. No. 37943.

Criminal Law: Trial: Evidence. Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Lyman & Meister and Howard P. Olsen, for appellants.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found Dorrine Amescua and Wayne Menard guilty of assault with intent to commit robbery. Appealing, they assert insufficiency of the evidence to support the verdicts.

The victim, Thomas Neu, Jr., an epileptic, was visiting in Scottsbluff on May 22, 1970, where Menard, his nephew, resided. The two men, Dorrine, and Phyllis Kills Small, now deceased, during the day were drinking intoxicating liquor excessively. When Neu walked out the rear door of a tavern, these events, according to him and a neighbor lady, occurred. Dorrine, Phyllis, and Menard suddenly attacked him. Menard and Dorrine beat him with their fists. The two women rifled his pockets. The assailants then returned to the tavern, leaving Neu in an injured condition on the ground. The events were unrelated to epilepsy.

Neu crawled to the front sidewalk. There police officers answering a call found him semiconscious with bloody clothing, bloody nose, and a deep slash between two fingers.

Conflicting testimony was given by Dorrine, her husband, Phyllis, and Menard as follows: Neu was ordered out of the tavern for disorderly conduct. The four were helping him out the rear door when Neu suffered an epileptic seizure. Menard unsuccessfully looked for medication by passing his hands over the outside of Neu's pockets. No one hit Neu. No hand went inside any of his pockets.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). The evidence is sufficient to sustain the verdicts against Dorrine and Menard.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE T. KIRBY, APPELLANT.
191 N. W. 2d 162

Filed October 29, 1971. No. 37969.

1. **Criminal Law: Right to Counsel.** An accused is not free to manipulate his right to counsel for the purpose of obstructing orderly procedure or other phases of judicial administration.
2. **Criminal Law: Continuances: Due Process.** Not every denial of a request by an accused for a continuance violates due process. The denial may honor due process, although a failure of evidence or a defense without counsel results. The answer must be found in the circumstances, particularly in the reasons presented at the time the request is denied.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

E. Dean Hascall, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SMITH, J.

A jury found Dale T. Kirby guilty of embezzlement. On appeal he asserts insufficiency of evidence and failure of the court to grant his pretrial request for court appointed counsel.

The information charged Kirby with embezzlement of $6,000 on July 18, 1969, from Martha Badura. Kirby, a practicing lawyer, had been administrator of the estate of Ernestine Litwin, deceased. Martha desired to pay $6,000 on a mortgage foreclosure decree that covered land owned by Ernestine at her death. She issued Kirby a check drawn on the Ashton State Bank and payable to order of Kirby, "Admr.," subject to this direction: "For payment for house." Kirby delivered the check endorsed in blank to the Clarke Bank at Papillion for collection but not for deposit. After payment of the item a cashier's check was issued by the Clarke Bank to Kirby as an individual.

Conversion of the property is undisputed. Prior to arrest Kirby orally admitted to Martha his individual liability. In a civil action by her against him individually to recover the $6,000, he confessed judgment.

Kirby contends that the $6,000 belonged to the administrator, not Martha, and that he therefore converted none of her property. A jury could properly find as follows: Neither party intended that Kirby could properly commingle the $6,000 with estate assets, that distribution of the $6,000 was to be subject to the order of the county court.

Although Kirby's endorsement was effective, it did not relieve him of criminal liability. See U. C. C., § 3-405 (2). We do not decide whether he possessed the property under color of his office. It is enough that ownership was in Martha. See § 28-538, R. R. S. 1943.

On March 6, 1970, Kirby was admitted to bail and

arraigned for plea to the information in district court at Papillion. The court offered to appoint defense counsel at public expense. Kirby declined. He also expressed a desire that the earliest trial date be in the fall term.

On August 27, 1970, at the docket call the court set the case for trial on November 30. By the latter date no one had appeared as counsel for Kirby. He then for the first time moved the court to appoint defense counsel and to continue the case. He said, ". . . my attorney, Francis Casey, . . . had to go to the . . . Hospital, the exact day I don't remember, but recently he stated. He . . . is not physically capable." Kirby also said he had contacted three other lawyers, none of whom were in a position to go to trial on November 30. He concluded: "I would like counsel appointed in any event. And I need a continuation, not only for myself, but if counsel were appointed . . ., it would be almost blank for him to try the case on the same day."

The county attorney objected to the motion on several grounds: Martha Badura had arrived from Ashton, 150 miles distant. Casey had been present in the courthouse without informing the county attorney that he intended to represent Kirby. The court in overruling the motion pointed out that 38 veniremen were waiting. Kirby offered no excuse for the late date of his motion.

An accused is not free to manipulate his right to counsel for the purpose of obstructing orderly procedure or other phases of judicial administration. See United States ex rel. Baskerville v. Deegan, 428 F. 2d 714 (2d Cir., 1970).

Not every denial of a request by an accused for a continuance violates due process. The denial may honor due process, although a failure of evidence or a defense without counsel results. The answer must be found in the circumstances, particularly in the reasons presented at the time the request is denied. See Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

Kirby's contentions are not well taken. The judgment is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. THOMAS G. H. GUTIERREZ, APPELLANT.
191 N. W. 2d 164

Filed October 29, 1971. No. 37978.

1. **Criminal Law: Constitutional Law: Jury.** A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn.
2. ———: ———: ———. To be constitutionally impermissible, the exclusion of any given sector of the population from jury duty must be purposeful or intentional.
3. ———: ———: ———. The use of voter registration lists or poll books for jury selection systems is constitutionally permissible.
4. ———: ———: ———. The Nebraska system of selecting jurors is clearly within constitutional limits.
5. **Criminal Law: Trial: Evidence.** Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession.
6. **Courts: Sentences: Probation and Parole.** Whether a defendant be sentenced or placed on probation is a matter within the discretion of the trial court.
7. **Criminal Law: Sentences: Appeal and Error.** Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Beatty, Morgan & Vyhnalek and William S. Padley. for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant was convicted of selling canabis sativa or marijuana. On appeal he contends there was error in the selection of the jury panel and in the admission in evidence of a bag of marijuana. He further urges that his sentence is excessive. On review of the record, we are constrained to affirm the judgment of the district court.

It is stipulated that the jury panel was selected in the manner provided by law. Slips numbered 1 to 10, inclusive, are placed in a receptacle and one number is drawn by lot. The list of registered voters, or if none, the poll books, are then opened. The name of the registrant or voter which corresponds with the key number drawn, and every tenth name thereafter, constitutes the names of persons comprising the jury panel, subject to deletion of those ineligible to serve or exempt from service. See §§ 25-1627 and 25-1628, R. R. S. 1943. It is said that Mexican-Americans are not properly represented upon the panels so selected yet the proportionate share of the population of the county comprised of Mexican-Americans is not reflected in the record. This failure, together with the fact that no challenge to the array appears, would ordinarily dispose of the question; however, since a constitutional question may be involved, that facet of the problem will also be considered.

A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. Swain v. State of Alabama, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759. To be constitutionally impermissible, the exclusion of any given sector of the population from jury duty must be purposeful or intentional. Swain v. State of Alabama, *supra*.

The use of voter registration lists or poll books for jury-selection systems has been repeatedly approved as constitutionally permissible even though the names were

not selected by lot. See, United States v. Butera, 420 F. 2d 564 (1st Cir., 1970); Camp v. United States, 413 F. 2d 419 (5th Cir., 1969); United States v. Caci, 401 F. 2d 664 (2d Cir., 1968).

It is difficult to conceive of a fairer or more practical method of selecting jurors than that used in Nebraska. The names are drawn by lot from lists of voters or registrants. The system is clearly within constitutional limits and renders impossible an intentional exclusion of any element of the population in a state or county where the privilege of voting is open to all who have attained the age required of an elector.

Regarding the admission in evidence of the packet of marijuana, the record reflects its purchase from defendant by a high school boy and that he took it to his home where it was found by his mother who turned it over to a police officer. It was retained in the custody of the police until the police officer produced the exhibit at defendant's preliminary hearing and thereafter it remained in the custody of the court reporter. The packet remained sealed after it came into the possession of the police officer except that he opened it once to remove some of the contents for the purpose of having it tested. Although the witnesses were unable to positively identify the contents as the same as those originally obtained, this fact was established by inference and presented primarily a question of the weight to be given this evidence. Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession. See State v. Bullard, 186 Neb. 709, 185 N. W. 2d 864.

The sentence imposed may, on the record, appear somewhat harsh. The court seriously considered probation, but, due to the defendant's apparent lack of frankness and general attitude, decided against it. The minimum sentence authorized by statute is 2 years. Defendant received an indeterminate sentence of 2 to 3 years. Although the issue is a close one, we cannot say

that the court abused its discretion in denying probation and the sentence imposed, being at about the minimum, leaves little room for reduction. Whether a defendant be sentenced or placed on probation is a matter within the discretion of the trial court. See State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. See State v. Trout, 186 Neb. 477, 183 N. W. 2d 923.

Defendant's contentions are lacking in merit and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VICTOR LEADINGHORSE, APPELLANT.
191 N. W. 2d 440

Filed October 29, 1971. No. 37984.

1. **Sentences: Statutes: Courts: Appeal and Error.** Section 29-2308, R. R. S. 1943, provides that this court may reduce the sentence rendered by the district court against an accused when in its opinion the sentence is excessive, in which event it renders such sentence as may be warranted by the evidence.
2. ———: ———: ———: ———. Where the punishment of an offense created by statute is left to the discretion of the district court to be exercised within certain prescribed limits, a sentence imposed within such limits will not ordinarily be disturbed where there is no abuse of such discretion.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Jeffrey L. Orr, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Appellant appeals from a 15-year sentence in the Nebraska Penal and Correctional Complex for the offense of sodomy. The only question raised in the appeal is whether under the circumstances the sentence was excessive. We affirm.

The record would indicate that the offense was forcefully perpetrated on a teen-age boy while both parties were confined in the Buffalo County jail. Appellant at the time was waiting trial on two separate felony offenses, one of which involved assault on a 12-year-old boy. The presentence investigation is a part of the record herein. It indicates that appellant has previously been confined in the Nebraska Penal and Correctional Complex. Under order of the Buffalo County district court on the assault charge, a psychiatric evaluation was made of appellant. The report indicates appellant was considered dangerous and homicidal.

Section 29-2308, R. R. S. 1943, provides that this court may reduce the sentence rendered by the district court against an accused when in its opinion the sentence is excessive, in which event it renders such sentence as may be warranted by the evidence. We have said that where the punishment of an offense created by statute is left to the discretion of the district court to be exercised within certain prescribed limits, a sentence imposed within such limits will not ordinarily be disturbed where there is no abuse of such discretion. See State v. Whitaker, 185 Neb. 57, 173 N. W. 2d 397.

In view of appellant's past record and the presentence information available to the district court, we cannot say that an abuse of discretion has been shown herein. Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN BOSTON, APPELLANT.
191 N. W. 2d 452

Filed November 5, 1971. No. 37869.

1. **Criminal Law: Insane Persons: Trial.** If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken.
2. ———: ———: ———. Except as otherwise provided by statute, the matter of granting a hearing on the issue of competency to stand trial rests in the discretion of the trial court.
3. ———: ———: ———. The means employed in resolving the question of sanity is discretionary with the court.

Appeal from the district court for Douglas County: DONALD HAMILTON, Judge. Affirmed.

John Boston, pro se.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a direct appeal from a conviction and sentence for robbery. We affirm the judgment and sentence of the district court.

It is the contention of the defendant that the trial court should have held a hearing for the purpose of determining the mental competency of the defendant to stand trial. On this issue, we recently said in State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766, as follows: "The means employed in resolving the question of sanity is discretionary with the court. 'If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should

be settled before further steps are taken. However, though a hearing on the issue is sometimes said to be obligatory if a reasonable doubt is raised, the doubt referred to is a doubt arising in the mind of the trial judge, as distinguished from uncertainty in the mind of any other person. Hence, except as otherwise provided by statute, the matter of granting an investigation rests in the discretion of the trial court. * * *' "

The defendant was represented by counsel. It does not even appear from the record that the competency of the defendant to stand trial actually was raised. The sole record on the matter shows that on August 10, 1970, at the defendant's request "arraignment is continued until Dr. Farrell indicates whether hospitalization is needed." Even if we were to assume that the defendant did show of record that he thereby raised the question of competency, there is a total absence in the record of any evidence indicative of the lack of competency. More important, if there were an examination by Dr. Farrell and if he made a report to the court, neither of which appear in the record, the record does not show the matter was again raised, either by counsel or by the defendant himself. The transcript and the complete record of the evidence are before us and at no time is there any suggestion of such a contention. As we have said, the matter of granting an investigation or a formal hearing rests within the sound discretion of the trial court. State v. Anderson, *supra*. The defendant, represented by competent counsel, proceeded to trial and never at any time by objection or by any other manner renewed the question of being competent to stand trial. There is no evidence in the record which would sustain a finding that a reasonable doubt as to the defendant's competency was raised and therefore that a hearing was obligatory under the doctrine of State v. Anderson, *supra*. There is no showing in the record or in the proceedings in connection with the sentencing and the motion for new trial which would sustain in any factual

sense the contention that the defendant was incompetent to stand trial at the time and the place he actually did. The defendant's theory seems to be that the mere raising of the question as to incompetency, in his own subjective opinion, produces a reasonable doubt as to his competency and, therefore, the court is required to hold a hearing. This, of course, is not the law as we have announced it in State v. Anderson, *supra*. There is no merit to this contention of the defendant.

By another assignment of error the defendant in a brief pro se apparently contends that he was convicted by the knowing use of perjured testimony. An accomplice of the defendant, William Walter Branch, testified as a State's witness. In substance, Branch stated he was acting of his own free will and he had not made a deal of any kind with the county attorney's office for testifying. Apparently, the defendant's contention is based upon an assumption as a fact that this accomplice testified falsely in denying that he was testifying as a result of a "deal" with the State and also in denying that he was testifying under the threat of additional charges being instituted against him. Whatever the defendant himself may think of this situation, the fact remains that there is absolutely no evidence to support the defendant's assumption. In other words, giving maximum import to the language used by the defendant in asserting this contention, there is absolutely no evidence to support the contention of perjury used, much less showing that it was willfully and knowingly used by the prosecution. There is no merit to this contention.

The defendant complains of the ineffectiveness of his counsel. Apparently, this is based upon the contention that counsel failed to produce and use at the trial a transcript of the testimony at the preliminary hearing. The record shows, however, that defense counsel very ably and successfully, by way of cross-examination, persuaded different witnesses to acknowledge that their identification of the defendant in court was something

short of being absolutely positive. Concessions also were secured as to minor discrepancies between their preliminary hearing testimony and their testimony at the trial. It appears that the introduction of the whole of the preliminary hearing testimony, even if successful, might have been fatal to the defense in this case. There is no merit to this contention.

Assignments of error by the defendant cannot be sustained. The evidence is conclusive as to the defendant's guilt following a sequence of eye-witness identification and apprehension within about an hour after the commission of a robbery.

The judgment and sentence of the trial court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND L. MOSS, APPELLANT.
191 N. W. 2d 543

Filed November 5, 1971. No. 37871.

1. **Criminal Law: Witnesses: Evidence.** A conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Each case must be considered on its own facts.
2. **Criminal Law: Right to Counsel.** Counsel for accused is not required to be present at the time of out-of-court photographic identification, regardless of whether the accused is in custody or not.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison, Bennett G. Hornstein, and Raymond L. Moss, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Defendant was tried and convicted by a jury on charges of sodomy, robbery, and the use of a firearm in the commission of a felony. The occurrences took place in the home of the female victim of the sodomy on the morning of August 8, 1970, between the hours of 6:30 a.m. to 7:30 or 8 o'clock a.m. The robbery occurred when a tradesman victim called at the home to make a delivery while the sodomy was in progress. The defendant was represented in the trial court and in this court by appointed counsel. Defendant has also filed a supplemental pro se brief.

Two assignments of error are made in the brief of counsel for the defendant: (1) The district court committed reversible error in not suppressing the eyewitness identification testimony of State's complaining witnesses after it was established at a pretrial hearing that their in-court identification of the defendant was not independent of their pretrial photographic identification of him involving a police procedure which was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (2) The district court committed reversible error in not suppressing the eyewitness identification testimony of State's complaining witnesses after it was established at a pretrial hearing that at the time of their photographic identification of the defendant 2 days after the alleged crimes he was in custody and, therefore, entitled to and denied his constitutional right to the presence of counsel at the photographic identification procedure utilized by police as a substitute for a formal lineup.

The court prior to trial held a Wade-Gilbert-Stoval hearing for the purpose of determining whether the

eyewitness identification testimony of the complaining witnesses should be suppressed. At the conclusion of the hearing the trial court found the witnesses' identification of the defendant was independent of their identification by photographs and that their testimony on this point should be admitted.

The record of the pretrial hearing as well as the trial record is before us. This record shows that shortly after and on the day of the occurrence the victim of the sodomy examined a large number of photographs from the police gallery. She picked out one photograph as resembling the perpetrator but made no positive identification. Two days after the occurrence the police, in an apparently unrelated incident, used tear gas to force a person from a house across the street from the witness' home. At that time the defendant came out and the complaining witness positively identified him as the man who had committed the act 2 days earlier. Thereafter the witness examined five photographs which were brought to her home by a police officer. Two of these she identified as the defendant. The witness was in the presence of the accused for an hour to an hour and a half on the day of the occurrence and was in bed with him for a part of that time. At the pretrial hearing she stated that she identified the accused from his having been in her home and that there was no doubt in her mind that he was the man. At the trial the photograph she picked out on the day of the crime (apparently not one of the accused) was introduced in evidence by the defense and the witness acknowledged that it was the photograph she had picked out. She acknowledged she had difficulty identifying Negro males.

The robbery victim testified at the pretrial hearing that on the day of the occurrence he had examined photographs at the police station and had picked out two as being pictures of the man who robbed him. One of these pictures apparently was not of the accused and was offered in evidence by the defense at the trial.

This witness sometime, apparently after the accused was in custody, looked at a series of five photographs brought him by the police and picked out two of these as being the defendant. At the pretrial hearing he was asked if he identified the defendant by virtue of the photographs or from having seen him and he stated: "I recognized him from seeing him up there when he got my money." He testified that he got a good look at the defendant when the accused opened the door at the time of the robbery and also later when the defendant returned to him a watch which the defendant had earlier taken. This witness at the pretrial acknowledged that he reported initially to the police that the robber was about 27 years of age. He was in fact much older. However, one of the defense witnesses testified that the defendant and his teenage son would pass for twins.

Both witnesses identified the accused at trial and at the preliminary hearing. The defendant, a black, was apparently the only black man present on those occasions.

The defense of the defendant was alibi. Two witnesses testified that on the morning of the occurrences he was present in the home of one of the witnesses from shortly after 7:30 a.m.

The defendant's assignment of error No. 1 must be rejected. State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, governs. There this court, applying pertinent decisions of the Supreme Court of the United States, said: "Each case must be considered on its own facts, and a conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was to impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

With reference to assignment of error No. 2, the United States Supreme Court has not yet held that the accused is entitled to have counsel at photographic identification. The defendant relies upon United States v. Zeiler,

427 F. 2d 1305 (3d. Cir.), which holds that he is entitled to counsel at such identification. The Second, Fifth, Seventh, Ninth, and Tenth Circuits have held otherwise. See, United States v. Bennett, 409 F. 2d 888; United States v. Ballard, 423 F. 2d 127; United States v. Fowler, 439 F. 2d 133. Until the United States Supreme Court holds otherwise, we adopt the latter rule.

The defendant's pro se brief attacks in general terms the fairness of his trial, questioning largely the eyewitness identifications, and attacks competence of counsel. The record does not support these claims.

AFFIRMED.

FRANK E. SCARPELLO, JR., ET AL., MINORS, BY MARIAN L. SCARPELLO, THEIR MOTHER AND NEXT FRIEND, APPELLEES, V. CONTINENTAL ASSURANCE COMPANY, APPELLEE, IMPLEADED WITH JOSEPHINE SCARPELLO, APPELLANT.
191 N. W. 2d 444

Filed November 5, 1971. No. 37897.

1. **Judgments: Evidence: Appeal and Error.** As a prerequisite to its examination in this court evidence adduced on a summary judgment hearing must be embodied in a bill of exceptions.
2. **Judgments: Evidence: Pleadings: Appeal and Error.** In the absence of a bill of exceptions in a summary judgment proceeding it is presumed that the evidence sustains the trial court's holding that there was no issue of fact presented by the proceeding; that it was correctly decided; and that the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

James R. Welsh, for appellant.

Richard L. Edgerton, John J. Respeliers, Thomas D. Carey, and Richard R. Morrison, Jr., for appellees Scarpello.

John R. Barton, for appellee Continental Assurance Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action for a declaratory judgment which was decided in favor of the plaintiffs on their motion for summary judgment. The defendant appeals. There is in this case no bill of exceptions showing the evidence in the summary judgment hearing. The bill of exceptions was quashed by prior order of this court.

The case involves the adverse claims of the plaintiffs, minor children of Frank Scarpello, deceased, and the defendant, Josephine Scarpello, mother of the deceased, to the proceeds of an insurance policy upon the life of the deceased. This policy is alleged to be one of the assets subject to the jurisdiction of the court in divorce proceedings hereafter mentioned. The plaintiffs claim as beneficiaries designated by order of the court in the divorce proceedings by their mother against Frank Scarpello. Josephine Scarpello sets up her claim in a cross-petition alleging that she had been designated as irrevocable beneficiary of the policy prior to entry of the order in the divorce proceedings. She also alleges facts which if true would make the decree of divorce null and void. Each party in the pleadings denies the factual allegations upon which the other's right of recovery depended.

In this state of the record the following principles are applicable: "As a prerequisite to its examination in this court evidence adduced on a summary judgment hearing must be embodied in a bill of exceptions. . . . In the absence of a bill of exceptions in a summary judgment proceeding it is presumed that the evidence sustains the trial court's holding that there was no issue of fact presented by the proceeding; that it was correctly decided; and that the only issue that will be considered on appeal is the sufficiency of the pleadings to support

the judgment." Jung v. Cole, 184 Neb. 153, 165 N. W. 2d 717. See, also, Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257.

"A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous. . . . In determining whether or not the pleadings support the judgment, they must be taken as a whole, and construed so as to support the judgment, if capable of such construction. The presumption is that the relief granted is authorized by the pleadings, and the burden is upon him who attacks the judgment to show that it was not." Blanco v. General Motors Acceptance Corp., *supra*.

The judgment of the trial court must be affirmed.

AFFIRMED.

JOHN W. BALLEW, APPELLEE, V. MARGARET ANN BALLEW, APPELLANT.
191 N. W. 2d 462

Filed November 5, 1971. No. 37923.

1. **Marriage: Annulment of Marriage.** In this state, a voidable marriage is legally valid for all civil purposes until its nullity is so pronounced.
2. **Divorce: Evidence.** Where a divorce decree requiring periodic alimony payments contains no provisions as to remarriage, the remarriage of a divorced wife establishes a prima facie case which requires the court to terminate alimony in the absence of proof of some extraordinary circumstance justifying its continuation.
3. **Divorce: Marriage: Annulment of Marriage.** Under a divorce decree providing that alimony payments shall terminate upon remarriage of the wife, the right of the divorced wife to receive such payments is terminated upon remarriage and is not revived by an annulment of her remarriage on grounds which rendered the remarriage voidable.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

A. James McArthur, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Charles E. Wright, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action to terminate a husband's obligation to make periodic alimony payments required by a divorce decree. The effect of the wife's remarriage and a subsequent annulment of the second marriage are the critical issues. The separate juvenile court modified the divorce decree and terminated the alimony payments.

The husband and wife were divorced and decree entered in the district court for Lancaster County, Nebraska, December 19, 1968. The decree approved and incorporated a settlement agreement between the parties. It required the husband to make monthly payments to the wife "during her lifetime and so long as the wife shall not remarry * * *," and provided that "the obligation of the husband to make periodic payments pursuant to this paragraph shall terminate on the death or remarriage of the wife." On June 30, 1969, the wife and one Aaron L. Unger were married in Lincoln County, Nebraska, under a marriage license obtained in Lancaster County, Nebraska. In July 1969, the wife and her new husband learned of the irregularity in their June marriage occasioned by the variance between the county of issuance of the license and the county in which the marriage occurred. On August 2, 1969, they were again married in Hall County, Nebraska. Thereafter, the wife began proceedings to terminate the marriage, apparently based on misrepresentation. On May 20, 1970, the district court for Lancaster County, Ne-

braska, entered its decree annulling the June and August marriages.

The husband remarried on April 28, 1970. In July 1970, he filed his petition for modification of the original divorce decree to eliminate alimony payments to the wife. On November 2, 1970, the separate juvenile court of Lancaster County entered its decree terminating the alimony payments as of June 30, 1969.

Essentially, the wife argues here that a provision in a divorce decree terminating alimony upon remarriage by the wife is not effective unless and until there has been a valid remarriage. The wife's argument rests on the assumption that when a voidable marriage is annulled, the decree relates back, makes the marriage void as though it had never occurred, and reinstates the original alimony decree. We cannot agree.

The issues have been considered by many courts. The most common basis for decision in this area seems to turn on the distinction between a void and a voidable remarriage. The great majority of courts have held that a wife's voidable remarriage terminates the prior husband's obligation for alimony, and that the termination of a voidable second marriage does not reinstate a right of support from the first husband merely because support is unavailable from the second. See Annotation, 48 A. L. R. 2d 270. For a discussion of policy considerations and current viewpoints, see Flaxman v. Flaxman, 57 N. J. 458, 273 A. 2d 567 (1971). Some states have held that where the second marriage was void as distinguished from voidable, the remarriage did not terminate the obligation of the first husband for alimony. See Johnson County Nat. Bank & Trust Co. v. Bach, 189 Kan. 291, 369 P. 2d 231.

At the very least, the facts in the case at bar establish that the remarriage here was voidable and not void. In this state, a voidable marriage is legally valid for all civil purposes until its nullity is so pronounced. Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613.

It is obvious that where a remarriage is terminated by the death of the husband, or by a decree of divorce, the wife is not entitled to reinstatement of a former husband's obligation to support her, regardless of whether any support is or is not available from the subsequent husband.

We see no reason to distinguish between a decree of divorce and a decree of annulment, at least where the annulment is based on grounds which render the marriage voidable rather than void. The fact that in many cases a wife may have the option of obtaining an annulment or a divorce should not give her a choice between two sources of support. We have held that even where a divorce decree requiring periodic alimony payments contains no provisions as to remarriage, the remarriage of a divorced wife establishes a prima facie case which requires the court to terminate alimony in the absence of proof of some extraordinary circumstance justifying its continuation. Wolter v. Wolter, 183 Neb. 160, 158 N. W. 2d 616.

In the case before us, the decree incorporated a settlement agreement and required alimony payments "so long as the wife shall not remarry" and provided that the obligation to make alimony payments "shall terminate on the death or remarriage of the wife." The wife is presumed to have known and understood the provisions of the divorce decree. There is no showing that she was incompetent or feebleminded, nor that the remarriage which she entered into was in any sense involuntary.

We hold that under a divorce decree providing that alimony payments shall terminate upon remarriage of the wife, the right of the divorced wife to receive such payments is terminated upon remarriage and is not revived by an annulment of her remarriage on grounds which rendered the remarriage voidable.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

GLADYS M. STEVEN, APPELLEE AND CROSS-APPELLANT, V. EFFIE LOUISE FORD, EXECUTRIX OF THE ESTATE OF LAURENE STEVEN, DECEASED, ET AL., APPELLEES, ANDREW J. MCMULLEN, INTERVENER-APPELLANT AND CROSS-APPELLEE.

191 N. W. 2d 446

Filed November 5, 1971. No. 37925.

1. **Garnishment: Property.** An attempt to proceed in garnishment to reach property that is not subject to garnishment is ineffective for any purpose.
2. **Garnishment: Wills: Property: Liens: Estates.** Where real estate is sold pursuant to a general power of sale contained in a will, a judgment creditor of a beneficiary of the estate has no lien upon the property sold or the proceeds of the sale.
3. **Creditor's Suits: Liens: Judgments: Estates.** A judgment creditor of a beneficiary may bring a creditor's suit to require that the distributive share in the estate be applied toward payment of the judgment.
4. **Creditor's Suits: Liens: Judgments.** A judgment creditor who brings a creditor's suit obtains a lien against the fund from the time of the commencement of the suit.
5. **Creditor's Suits: Liens: Intervention.** A judgment creditor who intervenes in a creditor's suit obtains a lien against the fund from the date of the intervention.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed as modified.

Andrew J. McMullen, pro se.

Oscar A. Drake, for appellee Gladys M. Steven.

Thomas Tye, for appellees Ford et al.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

Gladys M. Steven, the plaintiff, was divorced from Walter J. Steven, the defendant, on September 12, 1952. The plaintiff was awarded alimony in the amount of $22,500 of which $13,100 plus interest was due and unpaid on May 14, 1969.

Laurene Steven died on May 14, 1969. Her will, which was admitted to probate on August 1, 1969, devised a one-fourth interest in her "farm property" to the defendant, Walter J. Steven. On October 20, 1969, an execution was issued on the alimony judgment and an attempt was made to levy on the undivided interest devised to the defendant. A sale of the interest to satisfy the lien of the judgment was enjoined at the suit of the executrix of the estate of the deceased. The will contained a general power of sale, and on December 10, 1969, the property was sold by the executrix.

This action was brought on May 12, 1970, against the defendant and the executrix to require that the defendant's distributive share in the estate be applied on the alimony judgment. On July 31, 1970, the trial court ordered the executrix to pay the amount of the distributive share, $4,265.70, to the clerk of the district court to abide the judgment in the action.

On July 31, 1970, Andrew J. McMullen obtained leave to intervene in the action. The intervener had obtained a judgment in the amount of $6,750 against the defendant on November 25, 1969, and had made an unsuccessful attempt to proceed in garnishment against the executrix.

The trial court found that the defendant's distributive share in the estate should be applied pro rata to the judgments of the plaintiff and the intervener. The intervener appeals, claiming that the district court erred in not ordering the entire share to be paid to him. The plaintiff cross-appeals, claiming that she is entitled to have the entire share paid to her.

The intervener contends that his attempt to proceed in garnishment against the executrix established a right to the defendant's distributive share in the estate which is superior to that of the plaintiff. The distributive share in the estate was not subject to garnishment while it was in the hands of the executrix. American State Bank of Springfield v. Phelps, 120 Neb. 370, 232 N. W. 612.

Consequently, the intervener's attempt to proceed in garnishment against the executrix was ineffective for any purpose.

The plaintiff claims a superior right to the distributive share on the theory that the defendant received an interest in real estate upon the death of Laurene Steven on May 14, 1969; that this interest was subject to the lien of the alimony judgment which was then of record; and that the plaintiff's lien is prior to any right of the intervener based upon his judgment of November 25, 1969.

The will in this case gave the executrix a general power of sale which was exercised. Thus, the plaintiff's judgment did not become a lien upon the interest of the defendant in the estate of the deceased. See, Stalder v. Stalder, 105 Neb. 367, 180 N. W. 566; Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303, judgment vacated on other grounds on rehearing, 59 Neb. 94, 80 N. W. 263. Consequently, the plaintiff's right to the distributive share is derived through this action.

The commencement of the action created a lien in favor of the plaintiff against the defendant's distributive share in the estate. Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600; Hilton v. Clements, 137 Neb. 791, 291 N. W. 483; Flint v. Chaloupka, 72 Neb. 34, 99 N. W. 825. The intervener obtained a lien from the date of the intervention. Merchants' Nat. Bank of Omaha v. McDonald, 63 Neb. 363, 88 N. W. 492, rehearing denied 63 Neb. 377, 89 N. W. 770. The plaintiff and the intervener assumed adversary positions and each claimed the entire fund to the exclusion of the other. Under these circumstances, the plaintiff has a prior lien and the entire fund should be applied toward payment of the plaintiff's judgment.

The judgment of the district court is modified to provide that the fund shall be applied toward the pay-

ment of the plaintiff's judgment only. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

CITY OF IMPERIAL, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. LARRY RAILE, APPELLANT.
191 N. W. 2d 442

Filed November 5, 1971. No. 37936.

1. **Zoning: Ordinances: Evidence.** The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity.
2. **Zoning: Ordinances: Municipal Corporations: Injunctions: Estoppel.** A municipal corporation cannot be estopped from enforcing a valid ordinance, and an injunction is a proper remedy to prevent a continuing violation of a lawful zoning ordinance.

Appeal from the district court for Chase County: JACK HENDRIX, Judge. Affirmed.

Owens & Owens, for appellant.

Curtis & Curtis, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The City of Imperial, Nebraska, brought this proceeding against the defendant, Larry Raile, to enjoin him from keeping a structure, occupied as a residence, on his property. The district court granted a permanent injunction against Raile.

The defendant's property was situated within one-half mile of the corporate limits of the City of Imperial. It was zoned as Industrial-1 under a zoning ordinance passed and adopted by the city on August 8, 1966. The city had also adopted the 1955 National Building Code by ordinance on July 12, 1965. In May 1969, Raile purchased and placed what is referred to as a "mobile

home" on his property, and constructed a permanent foundation, porch, and steps.

On May 13, 1969, Raile filed an application for a variance from the zoning ordinance to permit the "erection of residence dwelling classified as a mobile home * * *." On June 5, 1969, the board of zoning adjustment of the city notified Raile that his request for a variance was denied. The vote was 3 to 2 in favor of the request, but lacked the required statutory number of concurring votes. See § 19-910, R. R. S. 1943. Raile did not take any appeal to the district court from the action of the board of zoning adjustment. Such an appeal allows a full review of both law and facts. See § 19-912, R. R. S. 1943.

There is a conflict in the evidence as to conversations had with various city officials as to a building permit, but the evidence is undisputed that Raile did not at any time file any formal or written application for a building permit.

On September 22, 1969, this proceeding was begun and the decree granting a permanent injunction against Raile was entered on July 9, 1970.

The defendant first challenges the validity of the zoning ordinance of the city on the ground that a comprehensive development plan was not adopted by the city council prior to the passage of the ordinance as required by statute. The evidence established that a comprehensive development plan was adopted on the same date as the ordinance. The provisions of section 19-901, R. R. S. 1943, as it existed in 1967, were fully complied with, as the district court found. Even if there were some doubt as to whether a comprehensive development plan in final form was adopted prior to the adoption of the ordinance, the ordinance here was passed in 1966. The statutes in effect in 1966 contained no requirement that a comprehensive plan be adopted by the city council. The requirement was simply that the zoning ordinance or regulations be made "in accordance with a

comprehensive plan * * *." See § 19-903, R. R. S. 1943, Reissue 1954. There is no dispute about the fact that there was a comprehensive development plan. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity. Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575.

Other assignments of error based on alleged failures to comply with statutory requirements in the process of adoption of the zoning ordinance were determined by the trial court adversely to the defendant. The trial court's determination was correct.

Raile also asserts that other persons had been granted variances under circumstances similar to his own and that the administration or enforcement of the ordinance as to him was arbitrary, unreasonable, and, consequently, unconstitutional. The evidence offered here was that certain other persons had been given building permits to erect structures for residence purposes in residential zones. Raile contended the circumstances and the structures were similar to his. The evidence established that these structures, with the exception of one temporary situation, were different from the Raile structure in construction as well as appearance. The evidence also established that these structures substantially complied with the building code, while the Raile structure did not meet the requirements of the building code in many respects. The district court specifically found that the other situations involving variances were not "like" situations to that of Raile, and that the application of the ordinance to Raile was not arbitrary or discriminatory. That determination is also supported by the evidence. It may be a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76. That rule does not apply here.

Raile also asserts that there are ample remedies at law and that the city's application for injunctive relief is unjustified and improper. Section 19-913, R. R. S. 1943, specifically authorizes a city to utilize the remedy of injunction in addition to other remedies for violation of zoning laws. A municipal corporation cannot be estopped from enforcing a valid ordinance, and an injunction is a proper remedy to prevent a continuing violation of a lawful zoning ordinance. See City of Beatrice v. Williams, 172 Neb. 889, 112 N. W. 2d 16.

We do not find it necessary to pass upon the issue of whether or not the zoning ordinances of Imperial forbid a "higher use" in a lower zone with respect to mobile homes. We point out again that Raile did not appeal from the order of the board of zoning adjustment denying his application for a variance nor did he at any time file any application or written request for a building permit. He voluntarily terminated the procedures for obtaining a variance, and he never commenced a procedure to obtain a building permit. Under such circumstances, he is in no position to complain.

The action of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VINCENT GARZA, APPELLANT.
191 N. W. 2d 454

Filed November 5, 1971. No. 37958.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Evidence: Rape.** In a prosecution for rape, corroboration as to the material facts and circumstances which tend to support the testimony of the complaining witness is sufficient.

3. **Criminal Law: Evidence: Trial.** A question which was summary in nature and included a statement as to the ultimate fact, although improper, was not prejudicial where the witness had testified in detail as to the facts constituting the offense.
4. **Criminal Law: Evidence: Witnesses.** A failure to require that the opinion of a medical expert witness be based upon reasonable medical certainty was not prejudicial where the witness had testified as to his objective findings and the answer expressed a positive opinion.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for forcible rape. The principal assignment of error relates to the sufficiency of the evidence to sustain the conviction.

The prosecuting witness was Gerda E. Galeckas, a high school student, 17 years of age. She testified that after school on September 4, 1970, she went to Glenda Myers' house where she did some drinking and participated in a game in which she removed some of her clothing. She left this house at about 10 p.m. and started to walk home with Arnold Phillips and Ronald Bartlett.

When Gerda was nearly home, an automobile driven by the defendant came by and Gerda and Ronald were invited to go riding. The defendant's brother, Steve Garza, and two other men were in the automobile. Ronald went over to the automobile and talked to the occupants and then came back and asked Gerda if she wanted to go riding. Ronald and Gerda entered the car, and after driving around for about 5 minutes the de-

fendant stopped the car and Ronald left the automobile. The defendant drove away and eventually stopped in Mandan Park. The three other occupants then left the automobile so that Gerda and the defendant were alone in the car.

Gerda testified that the defendant began to kiss her neck and placed his hands on her chest area. When she tried to push him away he struck her side with his fist and said: " 'Next time I will break your jaw.' " The defendant then held Gerda by her left arm and told her to get out of the car. They walked down a trail in the park and the defendant began kissing Gerda again. When she asked him to stop he choked her. When she started to cry out he said: " 'Stop, I will kill you.' " They stopped near a ledge and the defendant asked Gerda what she "had to live for." He then ordered her to remove her blouse. When she asked if she had to, he choked her again. They went on farther down the trail and the defendant ordered her to remove her undergarments. Every time Gerda would ask or say anything the defendant would hit or choke her. The defendant told Gerda to get down on the ground and he then had sexual intercourse with her. They returned to the automobile and she was taken to Glenda Myers' house.

Ronald Bartlett was not at Glenda Myers' house, so Gerda walked over to the Bartlett home. She found Ronald there and the two of them returned to Glenda Myers' house. Gerda's mother found her there at about 8:30 the next morning and took her home. Later Gerda's mother took her to the police station and to the office of Dr. James E. Ryder.

Dr. Ryder testified that he examined Gerda and found 3 linear bruised areas on her neck and several bruised areas on her thighs. He also found abrasions of the labia minora on both sides and a fresh laceration of the hymen but no sperm. Dr. Ryder stated that he thought Gerda

had engaged in sexual intercourse within the last 12 hours.

The defendant testified that he was 28 years of age; that he was not employed; and that he was living with his mother and father. His wife and one child were living in Missouri. He had a previous felony conviction.

The defendant further testified that Ronald Bartlett asked to be taken to Twentieth and Madison Streets so that Ronald could pick up a tape player; that he parked the car in Forest Park in Sarpy County, not in Mandan Park in Douglas County; that he tried to kiss Gerda but stopped when she asked him to leave her alone; and that she said she thought three of the fellows at Glenda Myers' had sexual intercourse with her. The defendant testified that he did not have sexual intercourse with Gerda at any time and that after they left the park he went home.

Vern Pokorski, called by the defendant, testified that he was at Glenda Myers' house at about 6:30 p.m., on September 4, 1970, and again between 9 and 10 p.m. When he returned to the house Gerda was in the basement lying on a bed. Gerda had passed out, and he helped take her outside where she revived. Gerda came back into the house yelling that she was going to get somebody for rape. Gerda then left the house and returned around 11 p.m., saying she was going to get "Garza" for rape.

In rebuttal the State called David Flowers, Marion Breland, and Ronald Bartlett. David Flowers testified that he was at Glenda Myers' house between 8 and 9 p.m., on September 4, 1970. He went downstairs and saw that Gerda and the others were playing some kind of a game. He went back to the living room, and about 5 minutes later Arnold Phillips and Marion Breland brought Gerda up the stairs. Gerda had been drinking and was dazed but was fully dressed. David testified that Gerda did not say anything about being raped or that she was going to get someone for raping her.

Marion Breland testified that he was at Glenda Myers' house on the afternoon of September 4, 1970. Marion testified that there was no sexual activity going on and no talk about sex. He was present in the basement at the time Gerda passed out and he helped take her outside the house. He did not hear Gerda say anything about being raped.

Ronald Bartlett testified that he was at Glenda Myers' house on the evening of September 4, 1970. His testimony was similar to that of David Flowers and Marion Breland as to what took place before he and Gerda left Glenda Myers' house.

Ronald testified that he and Gerda had nearly reached her home when the defendant came by in his car. The car stopped near them and Steve Garza called him over to the car. Ronald said that he did not want to go riding with them but that the defendant asked him to try to get Gerda into the car. Ronald then talked to Gerda and they both entered the car.

Ronald testified that the defendant stopped in Albright Park and that he and the defendant and Steve Garza got out of the car. The defendant told Ronald that they would drive around awhile and then come back for him. Ronald said that he did not say much because he was afraid of the defendant. The defendant then drove off with Gerda in the car. Ronald denied that he had asked the defendant to take him to Twentieth and Madison Streets so that he could pick up a tape recorder. Ronald testified that Gerda came to his house about 1½ or 2 hours after he last saw her at Albright Park. His testimony then corroborated that of Gerda as to what happened after that. Ronald testified that Gerda told him what had happened that evening.

The evidence for the State which has been summarized was sufficient, if believed, to permit the jury to find the defendant guilty of forcible rape. The evidence was in conflict and there were discrepancies in the testimony of some of the witnesses called by the State.

These were matters to be resolved by the jury. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

With respect to corroboration, it is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Texter v. State, 170 Neb. 426, 102 N. W. 2d 655.

During the direct examination of the complaining witness, and after she had testified in detail as to what had happened, she was asked a leading question which amounted to a summary of her testimony and a statement as to the ultimate fact that she had been raped by the defendant. An objection that the question invaded the province of the jury, made after the answer had been received and without a motion to strike the answer, was overruled. Although the question was improper, under the circumstances in this case the ruling was within the discretion of the trial court and was not prejudicial to the defendant.

The defendant also complains that Dr. Ryder should not have been permitted to state that he thought the prosecuting witness had sexual intercourse within the last 12 hours because the question did not require that his opinion be based upon reasonable medical certainty. The objection, which was overruled, asserted lack of foundation.

Dr. Ryder had previously testified as to his examination of the complaining witness and the objective findings which he had made. The foundation for testimony as to his opinion was adequate, and his answer expressed a positive opinion not based upon mere possibilities. Al-

though the form of the question may be criticized, there was no substantial prejudice to the defendant under the circumstances.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JUANELL NEAL ET AL., APPELLEES.

191 N. W. 2d 458

Filed November 5, 1971. No. 38245.

1. **Criminal Law: Statutes.** A crime must be defined with sufficient definiteness to inform reasonable men of what conduct will render them liable to punishment.
2. **Criminal Law: Statutes: Constitutional Law.** In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act.
3. **Criminal Law: Statutes: Constitutional Law: Appeal and Error.** In construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done.
4. ———: ———: ———: ———. A penal statute is presumed to be constitutional and unconstitutionality must be clearly established before this court is authorized to declare it void.
5. **Criminal Law: Statutes.** Section 29-109, R. R. S. 1943, requires that in the interpretation of a penal statute the language of the statute be construed by taking into consideration the context and subject matter relative to which they are employed.
6. **Criminal Law: Statutes: Courts.** In examining a statute to ascertain the intent of the Legislature, a court will not examine an operative provision without likewise examining a provision enumerating exceptions, and the statute shall be considered as a whole, in light of the objects and purposes of the act.
7. **Criminal Law: Statutes: Words and Phrases.** The term "unlawfully" is a word of common usage and as such need not be specifically defined in an instruction or statute.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Exceptions sustained.

Gordon Gobel, for appellant.

Ray C. Simmons, for appellees.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a prosecution for the unlawful possession of marijuana under the provisions of L.B. 326 (sections 28-4,115 to 28-4,142) enacted by the 82nd Session of the Legislature of Nebraska. The district court sustained demurrers to the informations filed against the defendants and ordered them dismissed. The State then obtained leave to docket error proceedings under section 29-2315.01, R. R. S. 1943, to review the orders of the district court. We sustain the exceptions.

The question presented by the parties is the constitutionality of L.B. 326. L.B. 326 is a comprehensive act designed to regulate the use, possession, manufacture, distribution, delivery, and production of drugs and controlled substances. The act generally is patterned after Public Law 91-513, 91st Congress, H. R. 18583, being the federal Comprehensive Drug Abuse Prevention and Control Act of 1970. The defendants were prosecuted under subsection (5) of section 11 of L.B. 326. Subsection (5) and its immediate context, under attack in this case, provide as follows:

"(3) A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act, shall, upon conviction thereof, be sentenced to a term of imprisonment not less than one year nor more than two years in the Nebraska Penal and Correctional Complex, or a fine of not more than five hundred dollars, or to a term of im-

prisonment in the county jail of not more than six months, or be both so fined and imprisoned.

"(4) Any person knowingly and unlawfully possessing marijuana weighing one pound or less shall, upon conviction thereof, be fined not more than five hundred dollars or shall be sentenced to a term of imprisonment in the county jail of not more than seven days, and shall be held separate and apart from other prisoners, or be both so fined and imprisoned.

"(5) Any person knowingly and unlawfully possessing marijuana weighing more than one pound shall, upon conviction thereof, be sentenced to a term of imprisonment of one year in the Nebraska Penal and Correctional Complex, or shall be fined not more than five hundred dollars, or shall be sentenced to a term of imprisonment in the county jail of not more than six months, or be both so fined and imprisoned.

"(6) If a person is convicted of a violation under this section, as a part of the sentence he shall be required during the period of confinement to attend a course of instruction conducted by the department on the effects, medically, psychologically and socially, of the misuse of controlled substances. He shall also be required to receive medical treatment, while so confined, *for the effect upon him of controlled substances.* If a person is placed on probation, as a condition of probation he shall attend and complete an identical course of instruction conducted by the department and pay a fee of five dollars for the course. As a further condition the person shall be required to receive medical treatment for the effects of controlled substances abuses."

The issue presented by this case is narrow. No dispute appears as to the rationale of the district court's decision. It rests upon the proposition that L.B. 326 fails to define the term "unlawfully" as contained in subsections (4) and (5) of section 11, being the separate penalty provisions of the act for the possession of marijuana. It is asserted, in substance, that since the

term "unlawfully" is not defined in subsections (4) and (5), the statute does not define a crime and, therefore, falls within the prohibition announced by this court in Macomber v. State, 137 Neb. 882, 291 N. W. 2d 674, which holds that no person can be punished in this state for any act or omission which is not made penal by the plain import of the written law.

We agree that a crime must be defined with sufficient definiteness to inform reasonable men of what conduct will render them liable to punishment. State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678; Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495. Framed in the constitutional context, L.B. 326 must have given the defendants a fair warning of the conduct which the act prohibited or the defendants would have been denied due process of law. In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act. Bouie v. City of Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). We agree that the plain import of the statute, under the doctrine of Macomber v. State, *supra,* must proscribe the conduct sought to be forbidden. As we have recently said, in construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done. State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569; State v. Simants, 182 Neb. 491, 155 N. W. 2d 788. A statute is presumed to be constitutional and unconstitutionality must be clearly established before this court is authorized to declare it void. Evans v. Metropolitan Utilities Dist., *ante* p. 261, 188 N. W. 2d 851. Section 29-109, R. R. S. 1943, of our penal code, requires in the interpretation of a penal statute, that the language of the statute be construed "taking into consideration the context and subject matter relative to which they are employed." It is fundamental that a statute will be examined as a whole in order to ascer-

tain the intent of the Legislature. The fundamental rule of statutory construction, to which other rules of construction must give way, is the ascertainment of the intent of the Legislature. However, in examining the statute to ascertain the intent of the Legislature, a court will not examine an operative provision without likewise examining a provision enumerating exceptions, and the statute shall be considered as a whole, in light of the objects and purposes of the act. Horack, Sutherland Statutory Construction (3d Ed.), § 4703; School Dist. No. 228 v. State Board of Education, 164 Neb. 148, 82 N. W. 2d 8.

The term "unlawfully" is a word of common usage and as such need not be specifically defined in an instruction or statute. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862; Schleif v. State, 131 Neb. 875, 270 N. W. 510; Carrall v. State, 53 Neb. 431, 73 N. W. 939; Hodgkins v. State, 36 Neb. 160, 54 N. W. 86. As a word of common import the word "unlawfully" generally implies that an act is done which is not authorized by law, in other words, an unauthorized act. We have no difficulty in coming to the conclusion that common usage dictates that "unlawfully" means unauthorized by law and, therefore, our examination is directed toward just what is authorized and just what is not authorized by L.B. 326. The defendants would have us examine only subsections (4) and (5) of section 11. However, section 2 of the act defines marijuana as a "controlled substance." Controlled substances may be lawfully in the possession of a person under circumstances that are outlined in sections 5, 6, 7, 8, 9, and 10 of the act.

As we mentioned before, the act is a comprehensive drug abuse prevention and control act following the federal pattern and must be examined as a whole to determine the clear legislative intent. Section 5 of L.B. 326 sets out the totality of circumstances in which possession of controlled substances (marijuana included) is *authorized*. Section 5, subsection (1), requires registra-

tion of those individuals who manufacture, prescribe, distribute, administer, or dispense controlled substances or those who intend to do so. Section 5, subsection (2), describes nonregistrants who may be "lawfully" possessed of controlled substances. In effect, section 5 says that registrants and those nonregistrants under subsection (2) are authorized by law to possess marijuana; i.e., these designated individuals are capable of having lawful possession of marijuana. Section 5, subsection (2), provides specifically as follows: "The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this act: * * *." Section 5, subsection (2)(c) provides as follows: "An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of the practitioner." Summarizing, the effect of section 5 is to say that registrants and some nonregistrants under subsection (2) are authorized by law to possess marijuana. That is, they alone are capable of having lawful possession of marijuana as pointed out above. It seems to us undisputable that lawful possession is defined in the act itself. It clearly and undisputably informs all who read the act under what conditions a person may possess marijuana. The comprehensive and detailed provisions of the act in connection with the manufacture and the medical and pharmaceutical dispensing of controlled substances make this even more abundantly clear. In other words, a person will either possess marijuana under circumstances authorized by law or he will not. The inference is clear to any person of ordinary intelligence that any other possession than that authorized by the act is unlawful and illegal. It becomes entirely unnecessary to specifically define the negative term "unlawful." The dividing line between authorized possession and unauthorized possession appears irrefutably clear from reading the whole act.

Read in this contextual sequence, section 11 of L.B. 326, under attack here, sets out clearly what is a viola-

tion of the act. The wording of section 11, subsections (1), (3), (4), and (5) makes reference in various patterns of words and phrases to conduct which is authorized by the act. For example, in section 11, subsection (1), is the following: "Except as authorized by this act, it shall be unlawful * * *." In subsection (3), is the following: "A person knowingly or intentionally possessing a controlled substance, * * * except as authorized by this act * * *." The intent of the Legislature in passing L.B. 326, as it concerns marijuana possession, is clear. Therein it is plainly stated under what conditions possession of marijuana is lawful. It is clear that the act considers all other possession to be unlawful if it occurs with knowledge.

The defendants would have us examine subsections (4) and (5) of section 11 of the act alone. Such a fragmentized and myopic approach is not permissible under the fundamental rules of statutory construction. Each part of the section should be construed in connection with every other part or section of the act so as to produce a harmonious whole. It is not permissible to confine an interpretation to the one particular section to be construed. It must be construed with reference to the idea or purpose of the whole instrument. Horack, Sutherland Statutory Construction (3d Ed.), § 4703. See, also, School Dist. No. 228 v. State Board of Education, *supra.*

It is true that it is common practice in legislation to state what is unlawful and follow that with a statement of exceptions. We see no vice or mischief in following the converse scheme of affirmatively stating in a statute those conditions under which possession shall be unlawful.

It is elementary that a statute should not be given an unreasonable or absurd construction. Subsections (4) and (5) of section 11 of the act were plainly intended to draw a dividing line in penalties between the possession of one pound of marijuana, more or less. Sec-

tion 28-470, R. S. Supp., 1969, which would be operative in the event L.B. 326 is declared invalid, provides for a minimum sentence of 2 years in prison for the possession of marijuana, with no distinctions made as to amount. These two subsections of section 11 demonstrate conclusively that the legislative intent was to impose a less harsh penalty. Yet the defendants ask us to reach a construction, based on a fragmentized consideration of the penalty provisions, which would result in a harsher sentence under the former penal statute than L.B. 326 provides. Furthermore, the acceptance of the contention that knowing possession of marijuana is lawful under the provisions of L.B. 326 would render meaningless and absurd the detailed and comprehensive provisions providing for the control, manufacture, prescription of, and pharmaceutical dispensing of marijuana. It is clear from an examination of this whole comprehensive act that detailed and rigid regulations, with strong penalties attached, are provided to limit the possession of the ultimate user to only medical and research purposes, other than that possession necessary in the legal manufacture, production, distribution, and delivery for those purposes.

We have examined the other contentions of the defendants and find them to be without merit. The orders of the district court sustaining the demurrers to the informations were incorrect and the defendants should not have been discharged.

EXCEPTIONS SUSTAINED.

McCOWN, J., concurring in result only.

The court's opinion belabors an issue of constitutionality when that issue was never raised by the defendants, and the opinion does not even intimate that the problem here arose from a patent legislative oversight.

BOSLAUGH, J., joining in concurrence.

ARDEN N. JOHNSON ET AL., APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT (FORMERLY CONSUMERS PUBLIC POWER DISTRICT), A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

191 N. W. 2d 594

Filed November 12, 1971. No. 37786.

1. **Eminent Domain: Damages: Evidence: Property.** The market value of property includes its value for any reasonable use to which it may be put.
2. ———: ———: ———: ———. The owner may show all reasonable uses to which the lands are adaptable and what the lands are worth in view thereof.
3. **Trial: Attorneys at Law: Appeal and Error.** One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict.
4. ———: ———: ———. To require a new trial, it must be shown that the alleged improper argument was such as to prejudice the substantial rights of a party.
5. **Eminent Domain: Damages: Evidence.** Evidence in an eminent domain case as to valuation for future uses must be limited to the adaptability of the land that may be reasonably expected in the immediate future.
6. **Eminent Domain: Damages: Evidence: Jury: Witnesses.** The weight and credibility of the testimony of both lay and expert witnesses as to the amount of damages sustained by the landowner is peculiarly of a local nature to be decided by the jury and the verdict will not be overturned if it is based on the testimony.
7. **Eminent Domain: Damages: Evidence: Jury: Property.** The fact that the jury had an opportunity to inspect the property was of significance in determining whether the verdict was excessive.
8. **Eminent Domain: Damages: Evidence: Jury: Appeal and Error.** When evidence in condemnation proceedings is conflicting, the jury's verdict will not be set aside unless clearly wrong. It is not for the reviewing court to decide which testimony the jury should believe.

Appeal from the district court for Fillmore County: JOSEPH ACH, Judge. Affirmed as modified.

Wilson, Barlow & Watson and Ted L. Schafer, for appellant.

Schmid, Ford, Mooney, Frederick & Caporale, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

In this eminent domain action, the defendant power district appeals from a judgment for the landowner plaintiffs of $28,800, asserting excessiveness of the jury verdict, instructional error, and improper argument to the jury. We affirm the judgment of the district court as modified.

The defendant's seven 2-pole structures (345,000 volt transmission line) were placed on a 150-foot wide easement in cultivated farm land, and cut diagonally for 5,677 feet across the 320-acre generally level, highly improved, single, integrated, unified corn and livestock farm operation of the plaintiffs. The farm is located in the northeast corner of Fillmore County, at or near the junction of York, Fillmore, Seward and Saline counties. Two-hundred and eighty acres are cultivated, and 240 acres are under irrigation. The farm is bordered by three good graveled farm-to-market roads, has 40 acres of hay and pasture, building areas, excellent soil (Hastings silt loam), and supports cattle feeding operations of 350 to 400 head. The 2-pole structures are diagonal to and crossways with all section lines and crop rows and none are on fence lines, next to roadways, or the natural division of fields. The 150-foot easement is broad in scope. Enjoyment by the plaintiffs is subject to unlimited access for survey, additional construction or reconstruction, operation, repairs, maintenance, relocation, etc.

Was there prejudicial error from improper argument of plaintiffs' counsel to the jury? In essence, plaintiffs' counsel argued that the taking prevented the installation of the center-pivot method of irrigation which would increase the corn production of the cultivated

land by 35 to 50 bushels per acre. The argument then proceeded to an opinion relating the monetary value of the increased yield to the value of the land at the time of the taking. The premise of the argument was the increased productivity of the land from center-pivot irrigation installation. It did not assume or relate to any profit figures or analysis of the farming or crop production as a whole. It was not within the prohibition of showing or arguing profits condemned by James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, modified, 136 Neb. 456, 286 N. W. 337.

Three witnesses had testified *without objection* that the farm was adaptable, at the time of the taking, in the immediate future to the use of the center-pivot irrigation system, and testified, again without objection, to an increased corn yield of 35 to 50 bushels per acre from such installation, all of which was prevented by the diagonal power pole structure taking.

We said in Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, as follows: *"The market value of property includes its value for any reasonable use to which it may be put.* If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. *The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?"* (Emphasis supplied.)

In Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865, where evidence as to the price of units of gravel was held admissible, this court said: "The owner may show all reasonable uses to which he thinks the lands are adaptable and *what the lands are worth in view thereof.* If, as a result thereof, there is conflict in whether the lands are adaptable for certain use it is up

to the jurors to determine which of the two views they believe." (Emphasis supplied.)

The plaintiffs' evidence as to greater productivity of plaintiffs' farm through use of the center-pivot system of irrigation was offered and received in evidence without objection by defendant. Under these circumstances error cannot be predicated upon such evidence. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223; Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607. It therefore follows that error cannot be predicated upon comment and argument by counsel on such evidence and any reasonable inferences therefrom.

We observe that the thrust of the defendant's argument on this point is that counsel's argument fixed a maximum valuation of the damage at $60,000 to $70,000. It argues forcibly that there was no testimony which would support a $70,000 valuation. However, there was testimony and evidence of damage of $64,000. We observe that the court instructed the jury to disregard all statements of counsel which were not supported by the evidence. Even assuming that counsel's argument was in error we fail to see any prejudice. It would appear, since the verdict was less than 50 percent of the estimate of the plaintiffs' expert witnesses and of counsel, that the jury relied on other evidence and reasoning as to valuation. To require a new trial, it must be shown that the alleged improper argument was such as to prejudice the substantial rights of a party. Anderson v. State, 184 Neb. 473, 168 N. W. 2d 383.

Moreover, the defendant did not, *at any time,* move for a mistrial. This is fatal to a complaint that counsel's argument was misconduct. We recently said in Vacanti v. Montes, 180 Neb. 232, 142 N. W. 2d 318, as follows: "One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict." See, also, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Dunn v. Omaha

& C. B. St. Ry. Co., 139 Neb. 765, 298 N. W. 741; Pieper v. City of Scottsbluff, *supra*.

Error in instruction No. 10 is asserted, chiefly because it is claimed that the jury was limited to a consideration of the center-pivot irrigation system's adaptability.

Since this was a major issue in the evidence in the case, the court quite properly instructed on it. But the court did not limit the jury's inquiry. In this and other instructions the court properly instructed the jury as to the elements of damage and that the jury's inquiry was to determine the fair market value in view of any reasonable use to which the land might be adapted. In cautionary language the court told the jury that it could not speculate as to whether or not the land was adaptable to center-pivot use. It told the jurors they must find from the evidence that it was adaptable to such use prior to the taking; that since the taking it was not adaptable; and that such adaptability affected the market value on July 21, 1969, the date of the taking. It specifically told the jury that such adaptability must be found to be reasonably probable, and not merely possible. It carefully cautioned them that such adaptability must be reasonably expected in the "immediate future" so as to affect market value at the time of the taking. See NJI No. 13.05, and cases cited thereunder. We find no error in the instruction.

We have examined the other contentions of defendant as to error in instructions, and they are without merit. The court properly limited adapted uses of the land to those "reasonably occurring in the immediate future" which would affect market value. (Instructions Nos. 6, 8, and 10.) See, Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Pieper v. City of Scottsbluff, *supra*. Defendants requested instruction No. 9, forbidding consideration of reasons special to the owner in valuing the land, which was covered by the court in instruction No. 16. Instructions Nos. 1 and 13 accurately recited the issues and correctly stated the law.

The verdict is attacked as excessive. We are dealing here with a large and valuable integrated farm unit. At a minimum the record supports a valuation of around $500 per acre, and runs as high as $720 per acre. The 150-foot diagonal easement with the present seven 2-pole structures running diagonally for over a mile across the farm is obviously a substantial factor affecting market value. The record supports, almost conclusively, that operation of the present irrigation systems will be materially inconvenienced and impeded in operation. With larger modern machinery and power units, aerial spraying of fertilizer, nutrients, and insecticides, and the large scale movement of tubing and irrigation equipment, the diagonal easement will realistically impair normal ground operations on the farm. Beyond this, the record strongly supports a conclusion that it cannot now be adapted to the use of an irrigation system (center-pivot) substantially increasing productivity. These are but a few of the factors in evidence before us for review.

The testimony as to the center-pivot system is conflicting, although admitted without objection. Much of the rest of the testimony as to inconvenience, interference, and danger as affecting market value is undisputed. A local jury viewed the premises. The jury was properly instructed. It is not contended that the verdict was the result of passion and prejudice. It was well within the range of the conflicting expert testimony as to valuation of damage. The verdict was less than one-half of the valuation testified to by plaintiffs' experts. It invites the suggestion that the jury actually disregarded much of the testimony discredited by the defendant. We are governed by the following rules: The weight and credibility of the testimony of both lay and expert witnesses as to the amount of damages sustained by the landowner is peculiarly of a local nature to be decided by the jury and the verdict will not be overturned if it is based on the testimony. Connor v. State, 175 Neb. 140, 120 N. W. 2d 916; Lansman v. State, 177 Neb.

119, 128 N. W. 2d 569; Iske v. Omaha Public Power Dist., 185 Neb. 724, 178 N. W. 2d 633; Timmons v. School Dist. of Omaha, 173 Neb. 574, 114 N. W. 2d 386; Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291. The fact that the jury had an opportunity to inspect the property was of significance in determining whether the verdict was excessive. Iske v. Omaha Public Power Dist., *supra.* When evidence in condemnation proceedings is conflicting, the jury's verdict will not be set aside unless clearly wrong. It is not for the reviewing court to decide which testimony the jury should believe. Connor v. State, *supra;* Timmons v. School Dist. of Omaha, *supra;* Deitloff v. City of Norfolk, 183 Neb. 648, 163 N. W. 2d 586.

The contention that the verdict is excessive and clearly wrong cannot be sustained.

The defendant complains of an allowance under section 76-720, R. R. S. 1943, of an attorney's fee in the sum of $5,000 and an allowance for expert witnesses' fees in the sum of $2,500. The matter of an allowance of an attorney's fee under this statute is discretionary. From the record, it is quite apparent that a portion of the $5,000 attorney's fee allowed was for services rendered in connection with the hearing before the appraisers in county court. The court overruled objections to a showing of these servicess and apparently considered them in making this award. Although we have not categorically so held, it is clear that the statute does not permit an award of an attorney's fee for services prior to the initiation of an appeal in district court. The statute says: "If an appeal is taken * * * and the amount of the final judgment is greater by fifteen percent than the amount of the award * * *." It is clear that the allowance is conditional. The services of the attorney and the expert witnesses must be related to the accomplishment of these conditions precedent as set up by the statute. We have inferentially so held in Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522; Hughes Farms, Inc. v. Tri-State Generation & Transmission Assn., Inc., 182

Neb. 791, 157 N. W. 2d 384. See, also, § 76-720.01, R. R. S. 1943.

Under the circumstances herein we determine that a reasonable fee for the plaintiffs' attorney in the district court is the sum of $4,000. We observe that only one attorney's fee is allowable but there is no prohibition to the assistance of additional necessary counsel depending upon the difficulty, complexity, and the necessary time required to adequately represent the condemnee. In the matter of expert witnesses' fees, the evidence is undisputed. The defendant offered no rebuttal testimony as to the value of the services of the plaintiffs' expert witnesses. The evidence shows that at the time of the hearing the sum of $2,235.21 had been paid to the witness Smith and $529.20 to the witness Licht. The court awarded the sum of $2,500 to the plaintiffs for expert witnesses. We see no abuse of discretion in this allowance. See, Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522; Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607.

The judgment and verdict of the district court in the sum of $28,800 for the plaintiffs is affirmed. The allowance of an attorney's fee in the sum of $5,000 is modified and reduced to the sum of $4,000. The allowance of $2,500 for expert witnesses' fees and expenses is affirmed. Costs of this appeal are taxed to the defendant.

AFFIRMED AS MODIFIED.

JANET J. KOHLER, APPELLEE AND CROSS-APPELLANT, V. FORD MOTOR COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

191 N. W. 2d 601

Filed November 12, 1971. No. 37796.

1. **Appearances: Parties: Jurisdiction.** An appearance is "general" if the party appearing invokes power of the court on any question other than jurisdiction.
2. **Pleadings: Limitations of Actions.** A cause of action pleaded

by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts.

3. **Torts: Negligence: Sales: Strict Liability.** A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a person rightfully using the article.
4. **Trial: Evidence: Parties: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, a party is entitled to a resolution of all the conflicts of the evidence in his favor, and all of the reasonable inferences that can be reasonably deduced from the proof.
5. **Trial: Evidence: Courts: Motions, Rules, and Orders.** The entertainment of a belated motion to strike testimony, no proper objection having been previously made, is discretionary with the trial court.

Appeal from the district court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

Cassem, Tierney, Adams & Henatsch, Lawrence J. Tierney, Theodore J. Stouffer, and Crites and Shaffer, for appellant.

Bump & Bump, Laurice M. Margheim, and Herbert Resner of Belli, Ashe, Ellison, Choulos & Lieff, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action by Janet J. Kohler against the Ford Motor Company to recover damages for personal injuries. The plaintiff was very seriously and permanently injured on August 7, 1960, when a 1960 Ford Falcon automobile in which she was a passenger left the highway and overturned. The automobile had been manufactured by the defendant and purchased new by Fred and Mabel Poppe on May 16, 1960, from Eustis Mercantile Company. Warranties which accompanied the sale limited the defendant's liability to replacement of de-

fective parts. At the time of the accident, the automobile was being driven by Lois F. Poppe, a daughter of the owners. Lois was killed in the accident.

The plaintiff's theory of the case is that the sector gear in the steering apparatus of the automobile was defective; and that sometime prior to the accident a tooth of the sector gear broke into two fragments which later caused the steering gear to "lock up" and as a result the automobile left the highway and overturned. Shortly after the accident, agents of the defendant dismantled the steering apparatus of the Falcon. When the housing containing the sector gear was opened it was discovered that one tooth of the sector gear was broken. When the grease was "dumped" out of the housing the two fragments of the broken tooth came out with the grease.

The trial court submitted the case to the jury upon the theory of strict liability in tort which placed upon the plaintiff the burden of proving, insofar as is pertinent on this appeal, only (a) the steering sector gear was defective when it left the manufacturer's hands and (b) that this defect was the proximate cause of the accident and the plaintiff's injuries. The jury awarded plaintiff damages of $325,000.

The defendant appeals and the following issues are before this court for decision: (1) Did the trial court err in overruling a special appearance by the defendant? (2) Was the cause barred by the statute of limitations because an amended petition, filed after the statute had run, presented for the first time the "strict liability" theory? (3) Should the doctrine of strict liability in tort be adopted and held applicable under the facts of this case? (4) If it is to be adopted, was the evidence sufficient to submit to the jury the issues designated (a) and (b) in the preceding paragraph hereof? (5) Did the trial court err in permitting the plaintiff to introduce the testimony of a certain expert witness on

rebuttal? We will treat each issue in the above order. We find for the plaintiff on all issues.

In the original petition filed July 9, 1962, the plaintiff, Mabel Poppe as administratrix of the estate of Lois F. Poppe, and Fred Poppe and Mable Poppe were all joined as plaintiffs and sought damages for their respective claims. The defendant filed a special demurrer which was sustained on the ground of misjoinder of causes of action and of parties plaintiff. The trial court, on motion of the plaintiffs, permitted each to file separate petitions and directed that they be separately docketed. The defendant was directed to answer within 30 days of the filing. No new process was served after the causes were separately docketed. Thereafter the defendant filed a special appearance which was overruled. Later demurrers and answers were filed, each preserving the special appearance. Later, on December 3, 1969, an amended petition was filed. Thereafter on December 16, 1969, the defendant, without preserving its special appearance, filed a motion to dismiss the action because of failure of the plaintiff to comply with a certain pretrial order. This motion to dismiss constituted a general appearance by the defendant and renders moot the issue raised by the special appearance. Abel v. Southwest Cas. Ins. Co., 182 Neb. 605, 156 N. W. 2d 166. This is not to be taken as deciding that the trial court did not have authority to permit separate docketing of the petitions of the plaintiffs while still retaining jurisdiction under the original process. We simply do not need, under the circumstances here, to reach that question. We note, however, that under code procedure the sustaining of a demurrer, even on misjoinder of parties plaintiff, does not bring the action to an end. § 25-854, R. R. S. 1943; 27 C. J. S., Dismissal & Nonsuit, § 63d, p. 418; 67 C. J. S., Parties, § 132a, p. 1135. Section 25-809, R. R. S. 1943, does not appear to be intended as a limitation on the powers of the court.

Plaintiff, in her amended petition filed December 3,

1969, claimed a right of recovery under theories of (1) res ipsa loquitur; (2) breach of express warranty; (3) breach of implied warranty; and (4) strict liability. Each of these is pleaded as a separate "cause of action." Earlier petitions had also been so composed presenting various theories of recovery, each being denominated as a separate cause of action. The defendant contends that the claim of a cause of action based upon strict liability is a new cause of action pleaded by amendment based on a different standard of care and is the equivalent of a new suit so the statute of limitations continues to run until the filing of the amendment, which in this case was more than 5 years after the plaintiff became 21 years of age. The defendant pleaded the statute of limitations in its "answer" to the plaintiff's amended petition. The defendant relies upon Miller v. Werner (Mo.), 431 S. W. 2d 116, wherein the Supreme Court of Missouri held in a suit for malpractice that where the original complaint was founded on negligence of the surgeon in the performance of the surgery, an amendment which sought recovery on the theory of the defendant's failure to obtain the plaintiff's informed consent did not relate back to the filing of the original petition and the statute of limitations therefore barred the action. We do not think that case is applicable here.

The mechanical form in which the plaintiff divided her petition is immaterial on the issue of whether it states one or more than one cause of action. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490. In this case if the plaintiff has not stated a new cause of action in the amendment it does relate back and the cause is not barred by the statute of limitations. We hold the amendment did not state a new cause of action. The plaintiff had but one. The theory of recovery is not itself a cause of action. A right not to be injured may rest upon more than one ground, but without injury there is no cause of action at all. The general facts upon which the right to recover was based are the same.

Abbott v. Abbott, 185 Neb. 177, 174 N. W. 2d 335; Clark on Code Pleading (2d Ed.), pp. 134, 137, 715; City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N .W. 2d 349.

There was no direct eyewitness testimony as to what caused the Falcon automobile to leave the highway. The plaintiff testified that the automobile "started to vibrate" and that it "swerved to the left-hand side of the road." The plaintiff looked at Lois and saw that she had both hands on the wheel, was looking straight ahead, and had a shocked expression on her face. Neither Lois nor the plaintiff said anything to each other at that time.

The Poppe automobile had passed another automobile on the curve west of the scene of the accident. The other automobile was being operated by Geraldine K. Licht and was traveling about 45 miles per hour in an easterly direction. The Poppe automobile was going about 50 miles per hour as it passed the Licht automobile. There was no other traffic nearby.

As the Poppe automobile returned to its own lane, after passing the Licht automobile, Mrs. Licht noticed that "the rear end wobbled like an empty pickup." Mrs. Licht did not notice anything further of an unusual nature until her husband, Walter H. Licht, who was sitting beside her, said: " 'Watch out for the car ahead!' " and " 'Slow down.' " Mrs. Licht testified that she noticed the Poppe automobile wobbled toward the left of the highway, back to the right, and then into the left ditch. The speed of the Poppe automobile was then about 50 or 55 miles per hour.

Mr. Licht testified that after the Poppe automobile had passed them he noticed that "the back end had a tendency to ride a little to the left-hand side." Then, as they were proceeding down the highway, he noticed the Poppe automobile "wobbled slightly," "hit the (right-hand) side of the road a little bit," and then "veered

across the road to the left-hand side, and went over into the ditch."

The highway where the accident occurred was a paved two-lane highway 21 or 22 feet wide with shoulders. The evidence negatives highway defects, oil slicks, automobile hood coming up, collision with animals, etc., as possible causes of the accident. After the accident, one of the rear tires was found to be flat. However, it had not blown out, it had no damage, and when reinflated on the same rim, which after the accident had a large dent on the inner flange, was found to hold air satisfactorily.

There had been no mechanical difficulties of any kind with the Poppe automobile. It had never been repaired and had received only normal maintenance. On the day before the accident it had been driven approximately 250 miles on a trip to South Dakota over winding roads, S curves, and pigtail turns with no difficulty of any kind.

The defendant urges that the trial court erred in submitting the case to the jury upon the theory of strict liability in tort because the doctrine is not the law of this state and should not be adopted as the law of this state. After examination of the many authorities cited by the parties, including pertinent prior decisions of this court, we conclude that the trial court correctly determined the state of the law and was correct in its instruction to the jury which we will hereafter refer to.

The Nebraska case most closely related in principle is Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252 (1961). In that case this court allowed recovery to a person injured by a foreign substance in a soft drink bottle. The court there said: "When a drink intended for human consumption is marketed in sealed containers, and such drink causes injury to a consumer, it is not necessary in a personal injury action to show that the container was within the physical control of a manufacturer in order to hold a manufacturer under the res ipsa loquitur doctrine. . . . The unexplained pres-

ence of a deleterious substance in a product manufactured and sold in a sealed container for human consumption is evidence of a breach of implied warranty that the product is wholesome and fit for human consumption. . . . A consumer can recover either on the theory of negligence or implied warranty from a manufacturer for injuries resulting from presence of deleterious substance in a product manufactured and sold for human consumption where it is shown that the deleterious substance was present when the product left the manufacturer's control." It is to be noted that here the court lessened the requirements of the res ipsa loquitur doctrine and eliminated the necessity of privity for recovery under the theory of implied warranty.

Earlier the Supreme Court of California, in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P. 2d 436, allowed recovery under similar theories to a person injured by an exploding soft drink bottle. In a separate concurring opinion in that case one of the judges urged as the proper basis of recovery the theory of strict liability in tort. This has come to be the accepted basis of recovery against manufacturers of defective products for injuries to users. We can see no rational distinction between the soft drink bottle cases and the case at hand. What we do here is really no more than announce a clarifying change of label. The courts of numerous, if not most, states have now adopted this doctrine of strict liability in tort. It would be superfluous for this court at this late date to expound the rationale at length or to cite numerous authorities. We refer the reader only to the following: Henningsen v. Bloomfield Motors, Inc., 32 N. J. 358, 161 A. 2d 69, 75 A. L. R. 2d 1, the landmark case, where the facts are substantially similar to those here; Restatement, Torts 2d, § 402A; Prosser, The Fall of the Citadel, 50 Minn. Law Rev. 791, where the leading case and subsequent developments are reviewed; Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897, 13 A. L. R. 3d 1049,

where the fundamental principle is succinctly stated.

We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product. The efforts of the manufacturer to limit its liability by rules applying to warranties are not effective here. See Greenman v. Yuba Power Products, Inc., *supra*.

The expert testimony in the case, insofar as it is relevant and material here, relates to the two issues of proof previously designated (a) and (b). There is no direct evidence that the steering gear "locked up" causing the accident. The gear turned freely after the accident.

Instruction No. 7 given by the court was in part as follows: "To recover against the defendant, the plaintiff must prove by a preponderance of the evidence: 1. The defendant placed the 1960 Ford Falcon automobile in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the automobile would be used without inspection for defects in the steering sector shaft; 2. The steering sector shaft was in a defective condition at the time it was placed on the market and left the defendant's possession; 3. The plaintiff was unaware of the claimed defect; 4. The claimed defect was the proximate cause or a proximately contributing cause of any injury to the plaintiff occurring while the automobile was being used in the way and for the general purpose for which it was designed and intended; 5. The defect, if it existed, made the automobile unreasonably dangerous and unsafe for its intended use; 6. The plaintiff sustained damages as the direct and proximate result of the claimed defect; . . .."

Issues 2 and 4 in the above instruction we have heretofore summarized are issues (a) and (b) and to the proof of these two items is directed substantially all of the voluminous expert testimony in the case. We briefly

summarize the testimony as follows: The plaintiff called Dr. Stensaas, head of the Department of Mechanical Engineering of the South Dakota School of Mines. He had conducted experiments upon a 1960 Falcon sector shaft using a Tinius Olsen machine and determined the amount of static pressure required to break the gear tooth in question and then conducted experiments on the steering apparatus to determine whether components of the steering mechanism would give way before sufficient pressure could be applied to the gear itself to make it give way. He found certain parts did give way before the teeth could be damaged. Based upon his examination of the gear tooth fragments from the accident car and the results of his experiments he was allowed to give his opinion that there was a reasonable probability of a defect in the manufacture of the gear in question.

Buddy Taylor, a mechanic and race driver who had built and repaired steering systems on hundreds of cars, worked with Bobby Unser, also a mechanic and a race driver, in the conduct of tests with a Falcon automobile like the Poppe car. They removed the sector shaft from the automobile, broke a tooth off, then broke the tooth in two parts, and then using an adhesive material replaced the tooth in the gear. They then reassembled the steering gear in the car. With Unser driving they took the car onto the highway to see what would happen. They turned the steering gear until the broken tooth dropped into the gear box and then continued to drive. After driving about 50 miles, the steering gear locked, the car left the highway and was damaged. Taylor gave as his opinion that the broken tooth locked the steering mechanism and caused the car to leave the highway. With the aid of an experiment using a mock-up of the steering mechanism, he testified that "it will not lock up necessarily in the same position twice," and in an answer to a hypothetical question

stated "that the tooth locked up the steering" and the car could not then be controlled.

Unser testified to his experience in doing specialized mechanical work and to the experiment that he and Taylor conducted. The gear locked slightly twice before locking up in such a manner that it left the road. He took the steering apparatus apart at the place of the accident and the broken tooth was in the bottom of the gear box. Unser further, after foundation was laid as to his qualifications to determine the difference between a defect in material and a trauma defect, gave his opinion, stating "the sector shaft was probably made improperly at the factory." He gave significance to the fact that the tooth was broken into two parts. He also testified that magnafluxing showed a spiral crack in the sector shaft which had no causal effect as far as the accident was concerned, nor was it caused by it, but simply showed that the sector shaft was defective. He also stated reasons why the accident itself could not have caused the fracture of the tooth.

The defendant called William J. Pfander, one of its quality control engineers, who testified he could determine the causes of breaks in metals. He gave as his opinion that the tooth in question broke from an overload; that there was "nothing abnormal about the fracture"; that the break in the gear was caused in the accident; "That this was a mechanical fracture resulting from impact"; and that there was no "evidence, whatsoever, of any crack that would have in any way resulted from the forging process." He also stated that the damage to the lower control arm would indicate to him there was sufficient force to have caused the tooth to be fractured in an accident. The defendant also called Mr. Lee, a mechanical engineer, who testified generally to the same effect.

In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in

his favor, and he must have the benefit of inferences reasonably deducible from it. Marquardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617. A jury verdict based upon conflicting evidence cannot be set aside unless clearly wrong. Haney v. L. R. Foy Constr. Co., 186 Neb. 528, 184 N. W. 2d 628. Both sides regarded the two key issues previously mentioned as the proper subject of expert testimony. Defendant, however, questioned the qualifications of the plaintiff's experts.

The nature and cause of the gear tooth breaking was clearly a matter for expert testimony as was the question of whether or not the broken gear could catch in the steering mechanism and cause the accident. As noted by McCormick: "An observer is qualified to testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both. While the court may rule that a certain subject of inquiry requires that a member of a given profession, as a doctor, an engineer or a chemist, to be called, usually a specialist in a particular branch within the profession will not be required. The practice, however, in respect to experts' qualifications has not for the most part crystallized in specific rules, but is recognized as a matter for the trial judge's discretion review-

able only for abuse." McCormick on Evidence, § 13, p. 28. We find no abuse of discretion here. The evidence on the points in question was sufficient to justify the verdict. Henningsen v. Bloomfield Motors, Inc., *supra*, at p. 409, 75 A. L. R. 2d 35; Elmore v. American Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P. 2d 84, 86, 33 A. L. R. 3d 406; Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P. 2d 168.

In rebuttal the plaintiff called Dr. Bradley, a professor of metallurgical engineering at the Colorado School of Mines, and Dr. Copeland, an associate professor in the same department. Dr. Bradley, after appropriate foundation was laid, gave his opinion that the fracture in the gear tooth of the Falcon was not an impact fracture and that the gear tooth had broken some time prior to impact. Dr. Copeland, after appropriate foundation was laid, testified the defect in the sector gear was a machine gouge in the base of the gear tooth, which would occur during manufacturing. Later a motion to strike this testimony was made upon the basis that it was improper rebuttal. No such objection was made at the time the evidence was admitted.

Assuming but not holding that the timely objection of "improper rebuttal testimony" would have been proper, the refusal to sustain the motion to strike was not error. Entertainment of a belated motion to strike testimony, no objection having been previously made, is discretionary with the trial court. Western Plastics Corp. v. Westinghouse Electric Corp., 184 Neb. 498, 169 N. W. 2d 1.

AFFIRMED.

BOSLAUGH, J., dissenting.

I dissent from that part of the opinion which holds the evidence was sufficient to permit the jury to find that a defect in the steering apparatus of the Poppe automobile, if one existed, was the proximate cause of the accident and the plaintiff's injuries.

Much of the evidence in this case relates to the issue

of whether the steering apparatus of the automobile was defective. There is very little evidence as to what caused the accident in which the plaintiff was injured. There is no direct evidence as to what caused the accident. What evidence there is as to this issue is circumstantial in nature.

Circumstantial evidence is not sufficient to sustain a judgment unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom. Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover.

The record shows that the plaintiff and Lois Poppe had worked as nurses' aides at Crawford, Nebraska, on the day that the accident happened. They drove to Crawford in the morning and at about 3 p.m., left Crawford to return to Chadron, Nebraska. They were about 8 miles west of Chadron on old U. S. Highway No. 20 when the accident happened. Lois, who was 17 years of age, was driving. The weather was clear and the road was dry. The highway was a 2-lane highway, 21 or 22 feet wide, with shoulders. There was a curve about 1¾ miles west of where the accident happened. Going from Crawford to Chadron the highway curved to the right and turned generally from north to east. From the curve the highway ran in a straight line to where the accident happened. The land was rolling and there were gradual changes in the elevation of the highway.

The trip was without incident until the accident happened. The plaintiff testified that the automobile "started to vibrate" and that it "swerved to the left-hand side of the road." The plaintiff looked at Lois and saw that she had both hands on the wheel, was looking

straight ahead, and had a shocked expression on her face. Neither Lois nor the plaintiff said anything to each other at the time of the accident.

The Poppe automobile had passed another automobile on the curve west of the scene of the accident. The other automobile was being operated by Geraldine K. Licht and was traveling about 45 miles per hour in an easterly direction. The Poppe automobile was going about 50 miles per hour as it passed the Licht automobile. There was no other traffic nearby.

As the Poppe automobile returned to its own lane, after passing the Licht automobile, Mrs. Licht noticed that "the rear end wobbled like an empty pickup." Mrs. Licht did not notice anything further of an unusual nature until her husband, Walter H. Licht who was sitting beside her, said: " 'Watch out for the car ahead!' " and " 'Slow down.' " Mrs. Licht testified that she noticed the Poppe automobile wobble toward the left of the highway, back to the right, and then into the left ditch. The speed of the Poppe automobile was then about 50 or 55 miles per hour.

Mr. Licht testified that after the Poppe automobile had passed them he noticed that "the back end had a tendency to ride a little to the left-hand side." Then, as they were proceeding down the highway, he noticed the Poppe automobile "wobbled slightly," "hit the side of the road a little bit," and then "veered across the road into the ditch on the other side." A large cloud of dust was thrown up and the Poppe automobile was out of their sight for a short time.

Ed Chamberlain, a deputy sheriff, was called to the scene of the accident. When he arrived the Poppe automobile was in the ditch north of the highway resting on its top and upper right side. He saw there were tracks showing that the right wheels of the automobile had traveled for approximately 225 feet on the right shoulder of the highway; that it then veered across the road to the left for a distance of 100 feet; that as it left the north edge of the pavement it veered a little bit more to

the east and traveled 65 feet until it hit a rut in the ditch; and that it then rolled end over end for a distance of 60 feet and came to rest. Chamberlain saw that one tire was down.

Everett C. Johnson brought the Poppe automobile into Chadron, Nebraska, after the accident. When he arrived at the scene of the accident the automobile was resting on its top and upper right side in the ditch north of the highway. The tire on the left rear wheel was flat, so he changed this wheel before tipping the automobile over onto its wheels. He then raised the front end of the automobile with the wrecker and towed it into Chadron.

After the accident the tire and the rim that had been removed from the left rear wheel of the Poppe automobile were examined. No puncture or other defect was found in the tire which was a tubeless tire. There was a large dent on the inner flange of the rim where the edge was bent inward.

There had been no mechanical difficulties of any kind with the Poppe automobile. It had never been repaired and had received only normal maintenance. On the day before the accident it had been driven approximately 250 miles on a trip to South Dakota over winding roads, S curves, and pigtail turns with no difficulty of any kind.

There is no direct evidence of any kind that the steering gear on the Poppe automobile "locked up" at the time of the accident or at any other time. The evidence is that the steering wheel turned freely after the accident.

Buddy Taylor and Bobby Unser, expert automobile mechanics with racing experience, were permitted to testify at length about experiments they conducted with a similar automobile. They were allowed to demonstrate before the jury that a tooth deliberately broken from a sector gear, which required a force of 20,000 pounds, and then broken into two pieces and replaced in the gear will, on occasion, cause the steering to lock up.

They testified that in driving a similar automobile, with the fragments of a broken tooth contained in the gear, the steering gear locked up 3 times in 50 miles, ultimately causing the automobile to leave the highway.

It is of some significance that in their demonstration it was necessary to turn the steering wheel to its limit and then reverse its rotation in order to produce a lock-up. It is also of significance that when the gear is locked so that it will not turn in one direction, the steering wheel may still be turned in the opposite direction.

At the time of the accident in this case, the automobile was traveling on a portion of the highway that was straight. There is no indication that the steering wheel was turned or being turned in the manner in which the fragments would cause the gear to lock up. The evidence is that the automobile first turned slightly to the right, then to the left, and then back to the right.

On the issue of proximate cause the testimony of Taylor and Unser as to their experiments with a similar automobile went no further than to show that it was possible for a fragment from a broken sector gear to cause the steering mechanism to "lock up" and prevent the steering wheel from being turned in one driection.

No one knows what caused the accident in this case. The burden of proof was on the plaintiff, and before she could recover she was required to prove that the accident was caused by a defect in the steering apparatus. It was not enough to show that it was possible for a defect to cause the accident.

There are several inferences as to causation that can be drawn from the evidence in this case which are opposed to the inference that the plaintiff relies on and which are at least as strong as the inference that the accident was caused by a defect in the steering gear. The "vibration" described by the plaintiff and the "wobbling" of the rear end described by the Lichts is consistent with the flat rear tire which was found after the accident. Lois Poppe was a relatively inexperienced

driver, and it is possible that overcorrection after driving onto the right shoulder of the highway in a moment of inattention resulted in loss of control.

If the proven facts go no further than to give equal support to two or more inconsistent inferences, the evidence is not sufficient to sustain a finding based upon one of the inferences. Sherman v. Lawless, 298 F. 2d 899 (8th Cir., 1962). See, also, Ford Motor Co. v. Mondragon, 271 F. 2d 342 (8th Cir., 1959), holding that the plaintiff cannot recover where the evidence fails to show that it is reasonably probable, not merely possible, that the accident was caused by the alleged defect, and more probable than any other hypothesis based on the evidence.

One other matter requires mention. Taylor was permitted to testify, over objection, that it was his opinion that a broken sector tooth locked up the steering gear and caused the accident. This was an ultimate fact to be decided by the jury upon the basis of the whole evidence and was not a proper subject for expert testimony in this case. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538. Until this case, this court has consistently held such testimony is improper. See, Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686; Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635; Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. I also agree with Judge Smith that the testimony was conjectural and superfluous.

SMITH, J., dissenting.

The circumstantial evidence rule stated in the second syllabus of Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919 (1967), is either misleading or incorrect. See Wolstenholm v. Kaliff, 176 Neb. 358, 366, 126 N. W. 2d 178, 183 (1964), (White, C. J., concurring).

Taylor's testimony to causation touched an ultimate fact, but there I see no reason for an exclusionary ruling. The testimony, however, was conjectural. Furthermore, assuming arguendo the existence of a factual issue of causation, I think the testimony was superflu-

ous. "'. . . whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid . . ., his testimony is superfluous . . ..'" Sears v. Mid-City Motors, Inc., 179 Neb. 100, 136 N. W. 2d 428 (1965).

I otherwise concur with the dissenting opinion by Boslaugh, J.

NEWTON, J., dissenting.

The evidence shows that the automobile in which plaintiff was a passenger was being operated at a speed of 50 to 55 miles per hour. It is not contended that the brakes were defective, yet the vehicle traveled over 385 feet from the time it first left the paved portion of the highway until it upset. It could readily have been stopped within that distance. Even if we accept *all* of plaintiff's contentions, it is apparent that the sole *proximate* cause of the accident was the failure of the driver to apply the brakes and stop.

STATE SECURITIES COMPANY, A CORPORATION, APPELLANT, V. NORFOLK LIVESTOCK SALES CO., INC., APPELLEE.
191 N. W. 2d 614

Filed November 12, 1971. No. 37922.

1. **Statutes: Constitutional Law: Torts: Actions: Legislature.** Section 69-109.01, R. R. S. 1943, is constitutional. The Legislature may abrogate a right of action for a tort to happen in the future.
2. **Statutes: Auctions and Auctioneers.** An auctioneer to bring himself within the exemptions of section 69-109.01, R. R. S. 1943, must comply with the conditions of said statute.
3. **Statutes: Notice: Security Interest: Words and Phrases.** The term notice in section 69-109.01, R. R. S. 1943, refers to actual notice and does not include the constructive notice afforded by the perfection and recording of a security instrument.
4. **Statutes: Auctions and Auctioneers: Mortgages: Agency.** An auctioneer operating as a market agency under the Federal Packers and Stockyards Act and who sells mortgaged cattle at the request of the mortgagors is not relieved from liability for conversion by the terms of the act.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

Hutton, Hutton & Garden, for appellant.

Jewell, Otte, Pollock & Gatz, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The plaintiff is a licensed lending agency. The defendant is a livestock auction company selling cattle on commission and licensed under the Federal Packers and Stockyards Act of 1921. The action is one for conversion of certain livestock, the property of one Gary L. Apfel, upon which the plaintiff had a perfected security interest. The case was tried by the judge without a jury upon the pleadings and a stipulation of the parties as to the evidence and testimony. There is no dispute as to the facts. The trial court rendered judgment for the defendant. We reverse the judgment and remand the cause.

Apfel caused the cattle to be delivered to the defendant to be offered for sale at public auction. The defendant had no actual knowledge of the plaintiff's security interest and was selling the cattle on commission in the usual course of its business. The plaintiff had no knowledge of the sale; it did not consent to the sale. The stipulation contained the following provision: ". . . there has been, prior to the sale, a full public disclosure of the name of the owner of the livestock by keeping the said name available in the office [of the defendant] to all prospective purchasers and people who inquire."

The defendant contends that it is exempt from liability for conversion under the provisions of section 69-109.01, R. R. S. 1943, and also contends that it is exempt from liability because, as a licensee under the Federal Packers and Stockyards Act, it cannot refuse to serve anyone offering cattle for sale. The plaintiff relies upon

State Securities Co. v. Svoboda, 172 Neb. 526, 110 N. W. 2d 109, and in its amended reply pled (1) the inapplicability of the Federal Packers and Stockyards Act; (2) that section 69-109.01, R. R. S. 1943, is unconstitutional and void in violation of Article I, sections 3, 16, and 25, and Article III, section 18, Constitution of Nebraska; and (3) "That no public announcement was made by the auctioneer at the time of sale of said cattle that the owner thereof was Gary L. Apfel."

The trial court found that section 69-109.01, R. R. S. 1943, was constitutional and afforded protection to the defendant, and that therefore it was unnecessary to consider the other issues raised. It dismissed the plaintiff's petition with prejudice.

Section 69-109.01, R. R. S. 1943, provides as follows: "The auctioneer, who in good faith and without notice of a mortgage thereon, sells personal property at auction, which is in fact subject to a chattel mortgage, for a principal whose identity has been disclosed, in which property the auctioneer has no interest but acts only as an intermediary of the owner is not liable to the mortgagee for any damage sustained as a result of such sale."

The legislative history of this statute indicates that it was enacted as a direct result of the decision in State Securities Co. v. Svoboda, *supra,* where this court held in a 4-3 opinion that an auctioneer who sells mortgaged property at an auction at the request of the mortgagor without the consent or knowledge of the mortgagee converts the mortgaged property and is liable to the mortgagee in conversion for the damages sustained. It clearly appears that it was the legislative intention and the purpose of the backers of section 69-109.01, R. R. S. 1943, to relieve auctioneers of what was deemed the harsh results of the opinion in the Svoboda case. In carrying out this intention, however, the Legislature did not make the exemption of the auctioneer from liability absolute. It laid down in the statute certain conditions for exemption. These are indicated by the statute itself

and are as follows: He must, in selling at public auction (1) act in good faith and without notice of a security interest thereon; (2) sell "for a principal *whose identity has been disclosed*"; and (3) have no interest in the property and act only as an intermediary of the owner. The stipulated evidence indicates quite clearly that the defendant met requirements (1) and (3). It just as clearly appears that it did not under the stipulated evidence meet condition (2) above. Under that provision the auctioneer must be acting for a principal "whose identity has been disclosed." To disclose means: to make known; open up to general knowledge; to reveal in words something that is secret or not known. Webster's Third New International Dictionary, Unabridged, p. 645. It is further to be noted that this statutory language speaks of the disclosure as having been made. The language is: ". . . sells . . . at auction . . . for a principal *whose identity has been disclosed* . . .." This can have no meaning other than that the auctioneer must have made before the sale some kind of public announcement which identifies the owner of the property which is to be sold. It is not for this court, but only for the Legislature, to determine the wisdom, necessity, or effectiveness of such a requirement. The Legislature did not abrogate the rule of State Securities Co. v. Svoboda, *supra*. It provided an exemption only upon compliance with the condition of the statute. We cannot read this condition in question out of the statute. As noted earlier, the stipulated evidence is that the defendant had the identity of the owner available to those who made inquiry and was ready to make disclosure. This does not meet the statutory requirement. The stipulated evidence does not indicate that any disclosure was in fact made. See Dodge v. Blood, 299 Mich. 364, 300 N. W. 121, 138 A. L. R. 322.

The plaintiff asserts that the defendant did not bring itself within the exemption of the statute because of the constructive notice afforded by the recording of the

security instrument. This contention must be rejected. The legislative history of the statute clearly indicates that the term notice in the statute refers to actual and not constructive notice.

The statute in question does not violate any of the constitutional provisions cited by the plaintiff. A person has no property—no vested interest—in any rule of the common law. While rights of property created by the common law cannot be taken without due process, the law as a rule of conduct, may, subject to constitutional limitations, be changed at the will of the Legislature. Mondou v. New York, New Haven & Hartford R.R. Co., 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327. The Legislature may abrogate a right of action for a tort to happen in the future. 16A C. J. S., Constitutional Law, § 643, p. 911; Nadzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A. L. R. 1189; Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221, 65 A. L. R. 939. See, also, Montana Meat Co. v. Missoula Livestock Auction Co., 125 Mont. 66, 230 P. 2d 955.

The plaintiff contends section 69-109.01, R. R. S. 1943, is impliedly repealed by the Uniform Commercial Code. A thorough examination of the code indicates this claim is unfounded.

We next turn to the defendant's contention that because it is a livestock marketing agency licensed under the Federal Packers and Stockyards Act of 1921 it is exempted from liability for conversion under the circumstances here. The act does not by its express terms purport to provide any such exemption. The contention is founded upon the premise that the marketing agency is in the nature of a public utility and required to serve all, and therefore is to be treated differently than an ordinary agent who cooperates in the conversion even though innocently. Most state and federal courts which have had occasion to consider the question have rejected the defendant's position. The rationale is well set forth in a recent decision of the Supreme Court of Mis-

souri in Farmers State Bank v. Stewart (Mo.), 454 S. W. 2d 908, where the principal cases on the point are discussed. This case overruled an earlier Missouri appellate court decision, Blackwell v. Laird, 236 Mo. App. 1217, 163 S. W. 2d 91. See, also, Birmingham v. Rice Bros., 238 Iowa 410, 26 N. W. 2d 39, 2 A. L. R. 2d 1108 (a 5-4 decision with a vigorous dissent); the Annotation at 96 A. L. R. 2d 225; and the cases cited in 1 A. L. R. 2d L. C. S. 192. Sullivan Co. v. Wells, 89 F. Supp. 317 (D. C., Neb.), and a few other cases support a contrary rule.

The judgment of the trial court must be reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL LOWREY, APPELLANT.
191 N. W. 2d 600

Filed November 12, 1971. No. 37934.

1. **Criminal Law: Evidence.** A person charged with a crime may be convicted on circumstantial evidence only.
2. **Criminal Law: Evidence: Jury: Instructions.** The activities of a thief ordinarily are secretive and are not usually carried out in the presence of witnesses. When the commission of the offense is carried out in such a manner, circumstantial evidence is necessarily the only evidence available, and where there are many circumstances pointing to the guilt of the defendant the question is for the jury under proper instructions safeguarding the rights of the defendant.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Peter B. Beekman, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant Michael Lowrey appeals from his conviction for grand larceny. The sole issue presented is the sufficiency of the evidence to sustain the conviction. We affirm.

Defendant was charged with stealing United States currency of the value of $5,150 from the husband of his grandmother. Five thousand dollars of that sum was in $100 bills; the balance was in $50 bills. The money had been concealed in the trailer home of the victim.

The jury could have determined from the evidence that on the evening of August 4, 1970, defendant did not have sufficient funds to buy cigarettes. Late that evening he was taken to his stepgrandfather's home to sleep in a truck which was parked in that location. The next day he purchased an automobile for $2,800, using 28 $100 bills. Five days later he traded that car for another one, paying an additional $800, in $100 bills. Four other $100 bills are accounted for in the evidence. One of them was given to an associate who was also charged with the same offense. This witness testified that the defendant, in response to a question as to whether he had stolen his stepgrandfather's money, replied that he had stolen a part of it.

The defendant argues that the evidence against him is entirely circumstantial. Even if we were to assume this premise and ignore the admission of defendant to his associate, the evidence is ample to sustain his conviction. A person charged with a crime may be convicted on circumstantial evidence only. State v. Coleman, 186 Neb. 571, 184 N. W. 2d 732.

The following from State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265, is particularly pertinent herein: "A jury, after considering the foregoing circumstances and the

inferences reasonably to be drawn therefrom, had ample evidence from which a finding of guilt could be found under the instructions of the court, informing it of the findings necessary to sustain such a conviction. The activities of a thief ordinarily are secretive and are not usually carried out in the presence of witnesses. When the commission of the offense is carried out in such a manner, circumstantial evidence is necessarily the only evidence available and where, as here, there are many circumstances pointing to the guilt of the defendant, the question is for the jury under proper instructions safeguarding the rights of the defendant. In such a situation the question of the guilt or innocence of the defendant is for the jury."

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DOROTHY B. SANDERS, APPELLANT, V. EVELYN M. DOYLE, APPELLEE.
191 N. W. 2d 545

Filed November 12, 1971. No. 37937.

1. **Parent and Child: Divorce: Infants: Judgments.** Where a parent has forfeited the right to custody of her children and the custody has been awarded to someone other than a parent, ordinarily the fact that the parent is now rehabilitated is not a sufficient change in circumstances to require a change in custody.
2. **Parent and Child: Divorce: Infants.** In determining the custody of children of tender years, the court will give consideration to the fact that the children have formed a natural attachment for a person who has stood in the relation of a parent.
3. ———: ———: ———. Although the preference of children as to custody is not controlling, it is a factor that will be considered by the court.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Padley & Dudden, for appellant.

Beatty, Morgan & Vyhnalek, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This action arises out of a controversy over the custody of two minor children, Gay Lynn Doyle and Louis Ivan Doyle. The district court awarded the custody of the children to Evelyn M. Doyle Kleinow, the defendant. The plaintiff, Dorothy B. Sanders, appeals.

The plaintiff and Ivan F. Doyle were married on February 20, 1954. Gay Lynn Doyle was born on February 11, 1958. Louis Ivan Doyle was born on March 12, 1960. In February 1966, the plaintiff left her husband and children in North Platte, Nebraska, and followed Joe Sanders to Wyoming. There she divorced Ivan F. Doyle on April 18, 1966, and married Joe Sanders on June 8, 1966.

On September 2, 1966, the defendant and Ivan F. Doyle were married. On November 3, 1966, the custody of the two minor Doyle children was awarded to Ivan F. Doyle by the district court. Ivan F. Doyle died on May 18, 1967, as the result of an accident. After his death the children continued to live with the defendant, their stepmother.

On June 5, 1967, the plaintiff commenced this action to obtain the custody of the children. The trial court found that the plaintiff had abandoned the children and forfeited her right to their custody, and awarded the custody of the children to the defendant. The plaintiff filed a motion for new trial but the motion was not heard until October 6, 1969.

On that date the parties filed an application alleging that they had entered into an agreement settling the matters in controversy between them, and requesting that the court approve the agreement. The agreement provided that an appeal from the probate proceeding in county court should be dismissed; that the proceeds of

an insurance policy should be divided ⅓ to the defendant and ⅔ to the plaintiff; that the proceeds from an action arising out of the injury and death of Ivan F. Doyle should be divided ⅔ to the defendant and ⅓ to the children of Ivan F. Doyle; and that the custody of the minor children should be awarded to Orrie Pursel, their maternal grandfather. The trial court approved the agreement, transferred the custody of the children to Orrie Pursel, and overruled the plaintiff's motion for new trial.

Shortly thereafter, Orrie Pursel permitted the children to live in the home of the plaintiff. A motion by the defendant to cite the plaintiff and Orrie Pursel for contempt resulted in their being fined on January 14, 1970.

On February 19, 1970, the plaintiff filed an application for an order permitting the children to live with her while the custody would remain with Orrie Pursel. A cross-application was filed by the defendant requesting that the custody of the children be placed with her. After a lengthy hearing the trial court found that Orrie Pursel was not willing to continue his custody under the order of October 6, 1969; that the plaintiff had forfeited her right to custody; and that the custody of the children should be awarded to the defendant. It is from this judgment that the plaintiff appeals.

The plaintiff contends that since she is the natural mother of the children, she has a superior right to their custody. The plaintiff concedes in her brief that at the time of her separation from Ivan F. Doyle she was unfit to have the custody of the children. She contends, however, that she has now rehabilitated herself and is a proper and suitable person to have the custody of her children.

Where a parent has forfeited the right to custody of her children and the custody has been awarded to someone other than a parent, ordinarily the fact that the parent is now rehabilitated is not a sufficient change in circumstances to require a change in custody. See,

McNeil v. McNeil, 182 Neb. 759, 157 N. W. 2d 185; Pollard v. Galley, 178 Neb. 587, 134 N. W. 2d 261.

The record fully supports the trial court's finding that the plaintiff abandoned her children in 1966. The care of the children then devolved upon the father, Ivan F. Doyle, and the defendant after the marriage on September 2, 1966. After his death on May 18, 1967, the children continued in the care of the defendant until October 6, 1969. During this time a strong attachment formed between the children and the defendant.

In determining the custody of children of tender years, the court will give consideration to the fact that the children have formed a natural attachment for a person who has stood in the relation of a parent. See, Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543; State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615.

At the hearing in July 1967, and again at the hearing in July 1970, the children each expressed a definite preference to live in the home of the defendant. Although the preference of the children as to custody is not controlling, it is a factor that will be considered by the court. See, Gray v. Hartman, 181 Neb. 590, 150 N. W. 2d 120; State ex rel. Cochrane v. Blanco, *supra;* Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445.

The defendant is now 47 years of age. Her husband is 49 years of age. They live in a modern home on a farm near Wellfleet, Nebraska. The record sustains a finding that this is a proper and suitable home for the children and that they are loved and well cared for by the defendant and her husband.

The plaintiff is 43 years of age and lives in North Platte, Nebraska. Her husband is employed by the Union Pacific Railroad but is near retirement. His age was stated in the record to be 65, 66, or 69 years. He did not testify at the hearing in July 1970, and it is apparent that he would be able to furnish but little parental guidance and assistance to the children. There is evi-

dence to the effect that the children do not relate with him and develop a nervous condition after living in the plaintiff's home.

The controlling issue in this case is the best interest of the children. The record fully sustains the finding of the trial court that it is in the best interest of the children that they be placed in the custody of the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVARO BRAVO ESCAMILLA, APPELLANT.
191 N. W. 2d 548

Filed November 12, 1971. No. 37965.

1. **Criminal Law: Words and Phrases.** A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.
2. **Criminal Law: Trial: Witnesses.** The asking of improper questions of a witness to which objections are sustained by the court does not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial.
3. **Criminal Law: Trial: Jury: Evidence.** The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
4. **Criminal Law: Sentences: Appeal and Error.** Unless an abuse of discretion appears, a sentence imposed by the trial court within statutory limits will not be disturbed on appeal.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Alfred J. Kortum, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

MCCOWN, J.

A jury found the defendant guilty of the crime of robbery and he was sentenced to the maximum term of 50 years imprisonment.

This is the second time this case has been before this court. The facts are graphically set out in our former opinion. See State v. Escamilla, 182 Neb. 466, 155 N. W. 2d 344. That occasion involved an appeal from a plea of guilty and a sentence of 50 years. This court affirmed the conviction and sentence. Thereafter, in compliance with an order from the Federal District Court, the guilty plea was set aside on constitutional grounds, and the trial to a jury now before us followed. The trial to the jury established and confirmed the facts recited in the previous opinion of this court.

The defendant first complains that the court erred in refusing to instruct the jury as to the offense of assault with intent to inflict great bodily injury on the theory that it was a lesser included offense. The court did instruct the jury as to the lesser included offense of assault with intent to commit robbery but refused to instruct as requested by the defendant. It seems clear that a charge of assault with intent to inflict great bodily injury is not a lesser included offense to a charge of robbery. A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. See State v. Jones, 186 Neb. 303, 183 N. W. 2d 235. Defendant's assertion on this count is without merit.

The defendant next asserts that a motion for mistrial made during the examination of a witness should have been granted. Robert A. Lacy, a police officer, had identified certain items of clothing as being the same ones he had found in the defendant's residence, and that he had sent them to the F.B.I. for examination. The follow-

ing, which constitutes the basis for defendant's assertion of error, then occurred: "Q * * * And how did you happen to go to the apartment, looking for these items? A They were — the items that Alvaro was wearing the night before — Mr. Kortum: (interjecting) We object to this as calling for a conclusion of the witness, and improper, and move for a mistrial. The Court: The objection is sustained. The jury will disregard the answer. Your motion is overruled."

It is clear that any possible error involved here was not prejudicial nor did it influence the jury to reach an improper verdict. Even if the questions were deemed improper, the asking of improper questions of a witness to which objections are sustained by the court does not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial. State v. Country, 184 Neb. 493, 168 N. W. 2d 918. A defendant is entitled to a fair trial but not a perfect one. State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87. We find no error prejudicial to the defendant. If there was any error, it was harmless, was cured by the court's action, and is within the ambit of the quoted rule.

The defendant also contends that the evidence was circumstantial and was insufficient to support the verdict. To the contrary, the evidence of guilt was overwhelming. Except for the fact that the victim was unable to make an eyewitness identification of the defendant because she had been permanently blinded in the course of the crime, this case is about as strong as a case can be where there is no direct eyewitness identification.

The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. Guy v. Doeschot, 183 Neb. 557, 162 N. W. 2d 524. The jury was

so instructed in this case and its determination of guilt is more than amply supported by the record.

The final contention by the defendant is that the sentence was excessive. Deliberately gouging out the eyes of a human being producing permanent blindness reflects a sadistic savage cruelty that is almost unbelievable. The facts and the basis for this court's view on the excessiveness of the sentence here are extensively set out in our former opinion. That view remains unchanged. The presentence investigation report now before the court shows that defendant's criminal conduct has occasioned almost continuous correctional confinement for him since he was 10 years old. It also shows a conviction and sentence for assault with intent to do great bodily injury which occurred since defendant has been in prison on the charge involved here. Unless an abuse of discretion appears, a sentence imposed by the trial court within statutory limits will not be disturbed on appeal. State v. Escamilla, *supra*.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. KEITH JAY BRATTON, APPELLANT.
191 N. W. 2d 612

Filed November 19, 1971. No. 37866.

1. **Criminal Law: Right to Counsel: Indigents.** The right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing.
2. ———: ———: ———. The right of an indigent to counsel cannot be manipulated so as to obstruct orderly procedure in the courts or to interfere with the fair administration of justice.
3. ———: ———: ———. When a defendant becomes dissatisfied with court-appointed counsel, unless he can show good cause to the court for the removal of counsel, his only alternative is to proceed pro se if he is competent to do so.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison, Stanley A. Krieger, and Keith Jay Bratton, for appellant.

Clarence A. M. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Keith Jay Bratton, was convicted of robbery and sentenced to an indeterminate term in the Nebraska Penal and Correctional Complex. His court-appointed counsel assigns as error the failure of the trial court to adequately advise defendant of his right to represent himself pro se. Defendant, pro se, additionally assigns as error: (1) That he did not waive a preliminary hearing in the municipal court; (2) that he was not allowed to call defense witnesses; (3) that he was not allowed to impeach a State's witness; (4) that the State purposely and illegally suborned perjury; (5) that the evidence is insufficient to sustain a conviction; and (6) that there were errors in the court's instructions to the jury. We consider first the assignment of error by defendant's court-appointed counsel.

The record as it pertains to defendant's request for appointment of counsel is as follows: On August 10, 1970, the defendant in a poverty affidavit sought "appointment of counsel to represent me and to advise me as to my rights under the law." The public defender was appointed. On August 21, 1970, the defendant, in a handwritten motion, stated inter alia that the defendant "will accept any lawyer appointed by this court, except the public defender office." On September 17, 1970, the day of the trial, previous to impaneling a jury, the court, out of the presence of the jury panel, considered defendant's motion for the appointment of sub-

stitute counsel. Defendant was present with Mr. Carey and Mr. Cullan of the public defender's staff. Defendant advised the court that he did not feel he would be adequately represented by the public defender's office, and stated: "Last Friday I was in the courtroom three times, and on the last occasion Judge—Judge Krell, I believe—*told me that I would be able to represent myself.* I did not have any desire to represent myself, but rather than going in with the Public Defender's Office, I so stated that I would do that, and he instructed the Public Defender, Mr. Cullan, to give me records that he, hisself, now hold, give me duplicate of these records, and Mr. Cullan, he was also instructed, the Public Defender's Office, to make available to me various law books and until this date, I have not received any law books or any assistance as to the method of going about defending myself although I really didn't wish to do it." (Emphasis supplied.)

In response to defendant's allegations, Mr. Carey stated that on the 11th day of September 1970, defendant appeared before Judge Hamilton and said that he wished to represent himself and to discharge the public defender's office, and an order was accordingly entered by Judge Hamilton and trial was set for September 14. On September 14, defendant requested that the public defender's office again be appointed to represent him. On this occasion Mr. Carey was directed to assist Mr. Cullan in defendant's defense, and trial was scheduled for September 17. Both Mr. Carey and Mr. Cullan participated in the trial.

There is general agreement that an indigent defendant is not entitled to select the counsel to be appointed for him. State v. Powell, 277 N. C. 672, 178 S. E. 2d 417 (1971). Neither can his right to counsel be manipulated so as to obstruct orderly procedure in the courts or to interfere with the fair administration of justice. United States ex rel. Baskerville v. Deegan, 428 F. 2d 714, (2d Cir., 1970).

The following language from State v. Fagerstrom, 286 Minn. 295, 176 N. W. 2d 261 (1970), is pertinent herein: "However, the right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing. The court is obligated to furnish an indigent with a capable attorney, but he must accept the court's appointee. Although he may ask for a substitution, his request will be granted only if exceptional circumstances exist and the demand seems reasonable."

In order for a defendant to secure substitute court-appointed counsel, he must show good cause to the court for the removal of present counsel. This the defendant failed to do, as is fairly apparent from the recitals above. Many defendants on occasions become dissatisfied with court-appointed counsel but mere dissatisfaction is not grounds for removal of such counsel. When a defendant becomes dissatisfied with court-appointed counsel, his only alternative is to proceed pro se if he is competent to do so. Here, however, it is apparent that defendant wanted counsel, any counsel not a member of the public defender's office. Defendant was adequately informed that he had the right to proceed pro se. When he was given that right on September 11, he later changed his mind. If on September 17, the defendant did not want to proceed with the counsel provided, he had a right to discharge court-appointed counsel and to proceed pro se. He was required to make an unequivocal request to do so. This he did not do. There is no merit to this assignment.

Defendant's pro se assignments of error are equally frivolous. Assignments of error (1) and (6) are not even referred to or mentioned in any manner in defendant's argument. While the municipal court record is not a part of the transcript herein, defendant's own statement would indicate that a preliminary hearing was held.

As to assignment (6), the record indicates that the instructions were submitted to counsel for approval and

after suggested changes were made, the instructions were approved as amended.

On assignment (2), the record indicates that defendant's counsel filed an affidavit requesting process for certain defense witnesses, and the clerk of the district court was ordered to issue such process.

As to assignment (3), defendant testified at the trial, and his version of the affair was before the jury. His counsel did attempt to impeach the complaining witness. Credibility was definitely in issue, with the jury accepting the version of the complaining witness rather than that of the defendant. Assignment (4) is a conclusion which finds no support in the record, nor is there any merit to assignment (5).

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY REICHEL, APPELLANT.
191 N. W. 2d 826

Filed November 19, 1971. No. 37874.

1. **Post Conviction: Motions, Rules, and Orders.** The Nebraska Post Conviction Act requires that unless the motion and the files and records of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto.
2. **Post Conviction: Motions, Rules, and Orders: Pleadings.** A motion for relief under the Nebraska Post Conviction Act must state all grounds which are available to the prisoner as a basis for relief at the time the motion is filed.
3. ———: ———: ———. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Merritt E. James, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is a post conviction action involving the right to counsel. The motion to vacate sentence was overruled by the district court without an evidentiary hearing after a review of the records and files in the case.

In 1966, the defendant was found guilty of burglary and found to be an habitual criminal, and was sentenced to 10 years imprisonment. The evidence of prior felonies presented to support the habitual criminal count included a 1958 burglary conviction. The record of that 1958 conviction states: "* * * defendant appears without counsel and after specifically waiving preliminary hearing, service of copy of the information, twenty-four hours in which to plead and right of counsel, said defendant standing at the bar of this court in open court is duly arraigned * * *." The 1966 burglary conviction was appealed to this court and affirmed. See State v. Riley et al., 182 Neb. 300, 154 N. W. 2d 741 (1967). Later the defendant filed a motion for post conviction relief. The alleged grounds for relief involved discovery procedures in the 1966 burglary trial. That post conviction motion was overruled by the district court without an evidentiary hearing and that action was affirmed by this court. See State v. Reichel, 184 Neb. 194, 165 N. W. 2d 743 (1969). The present post conviction proceeding based on the right to counsel issue was commenced June 23, 1970.

The defendant contends that the 1958 record on its face is insufficient to show an intelligent and under-

standing waiver of the right to counsel. The federal cases support that position. See, Gideon v. Wainright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A. L. R. 2d 733; Burgett v. Texas, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319; Losieau v. Sigler, 406 F. 2d 795 (8th Cir., 1969); Beasley v. Wilson, 370 F. 2d 320 (9th Cir., 1966).

The State suggests that the mere recitation in the record that the defendant waived the right to counsel is sufficient to place the burden of proof upon the defendant to show that he did not intelligently and understandingly waive counsel. Even if we assumed that contention to be correct, no evidentiary hearing was granted at which either the defendant or the State would have been able to produce evidence. Having the burden of proof ordinarily presupposes the right to introduce evidence.

The Nebraska Post Conviction Act requires that unless the motion and the files and record of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito, *ante* p. 328, 190 N. W. 2d 781.

If the motion for post conviction relief here were the first occasion on which the defendant had sought to challenge this conviction in a post conviction proceeding, we would be forced to require the granting of an evidentiary hearing upon the issues raised here. However, this is the second occasion on which the defendant has sought post conviction relief from the same conviction and sentence, although the grounds now asserted are different. These grounds, however, were available to the defendant at the time of his former motion to vacate conviction and sentence.

There ought to be some final end to litigation in a criminal case. Post conviction procedures come into play only after traditional criminal procedures have been completed. Post conviction remedies are cumulative and are not concurrent with any other remedy. There is

no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence.

Section 29-3001, R. S. Supp., 1969, dealing with our post conviction procedure, provides in part: "The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner." We hold that a motion for relief under the Nebraska Post Conviction Act must state all grounds which are available to the prisoner as a basis for relief at the time the motion is filed. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

The action of the district court was correct and is affirmed.

AFFIRMED.

SPENCER, J., not participating.

MARJORIE J. KANE, APPELLANT, V. UNITED CATHOLIC SOCIAL SERVICES OF OMAHA, INC., APPELLEE.
191 N. W. 2d 824

Filed November 19, 1971. No. 37962.

Infants: Parent and Child: Statutes: Adoption: Acknowledgments. A relinquishment of a child for adoption made voluntarily and in accordance with the provisions of section 43-106.01, R. R. S. 1943, is not revocable.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

S. J. Albracht and Michael P. Cavel of Lathrop, Albracht & Dolan, for appellant.

John H. Kellogg, Jr., of Hotz, Byam & Kellogg, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The relator filed in the district court an application for writ of habeas corpus testing the right of the respondent to the custody of and its right to consent to the adoption of the infant son of the relator. The relator, age 22, is the natural mother of the child who was born out of wedlock October 11, 1970. The respondent is a licensed child placement agency under the statutes of the State of Nebraska. On October 21, 1970, the mother executed a relinquishment under the provisions of section 43-106.01, R. R. S. 1943, and delivered custody of the child to the agency. The agency at that time in writing accepted responsibility for the child as required by statute.

The application alleges that relator signed papers without knowing their contents and that the child is being unlawfully held by the agency. There is no real dispute in the evidence. The relator's own testimony, as well as that of the other witnesses, clearly and without dispute shows that she knew the contents and the nature and effect of the relinquishment which she executed at the time she delivered custody of the baby to the agency. The relinquishment in form satisfies the statutory requirements and the evidence shows that it was acknowledged and witnessed in conformity with the statute.

The mother's position, as stated by her attorney during the trial, is that the relinquishment is the fruit of "economic coercion and economic duress" and therefore should not bind her. She acknowledges that no representative of the agency exercised any duress or coercion of any kind or degree to induce her to execute the relinquishment.

The evidence shows that the mother was gainfully

employed until about 3 months before the child's birth when she took a leave of absence from her employment; that her employment was open to her after the birth of her child; that she had an apartment of her own; and, before the child's birth, determined that she would keep the baby and to that end had acquired certain equipment and had made arrangements for someone to care for the child when she returned to work. These plans, the evidence shows, were frustrated because of the exhaustion of her financial resources and because the child's birth resulted in complications which required her to remain away from her employment and to be under a doctor's care for 2 weeks after her release from the hospital. The relator and her baby stayed at the home of relator's parents after she and the baby were discharged from the hospital and up to the time of the execution of the relinquishment. The evidence shows that the relator's parents, particularly her mother, wanted her to relinquish the child for adoption and made known their desires to her, and that the relator's mother made the initial contact with the agency.

In the two discussions which the relator had with agency representatives, one before signing the relinquishment and one at the time of the execution of the relinquishment, the matter of the relator's finances was not discussed. She did not ask for or receive any advice on possible sources of financial aid which might have enabled her to keep the child. At the trial when asked why she gave the child up, she stated: "Because I didn't have any money to take care of him or food or anything." And in reply to the question, ". . . did you see any possibility of feeding the child and caring for the child yourself?" she answered: "No. I didn't know what else to do. . . ." On cross-examination she stated: "I didn't have any other choice."

The relator contends that the respondent had a duty to make inquiry concerning her economic circumstances and to suggest to her ways and means which would have

enabled her to keep the baby. The law places on the placement agency no such obligation.

The second day after the execution of the relinquishment, upon learning from a friend that she could obtain financial assistance and child support from the Department of Welfare, she called the agency and told them she wanted the baby back. The agency did not return the baby although there apparently was some discussion concerning this, the nature of which is not disclosed by the record.

Section 43-106.01, R. R. S. 1943, provides in part as follows: "When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, . . . to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child *and have no rights over such child.*" (Emphasis supplied.) This case is governed by the statute and Batt v. Nebraska Children's Home Society, 185 Neb. 124, 174 N. W. 2d 88. The relinquishment if voluntary, as it is here, is not revocable. Stresses, motivations, and circumstances such as are outlined by the evidence are probably present in many cases such as this. Much as we are moved by the mother's evident desire for her child and the unfortunate circumstances which motivated her decision to sign the relinquishment, we have no choice but to affirm the judgment.

AFFIRMED.

GEORGE C. BELEK ET AL., APPELLANTS, V. TRAVELERS INDEMNITY COMPANY ET AL., APPELLEES.
191 N. W. 2d 819

Filed November 19, 1971. No. 37966.

Judgments: Trial: Appeal and Error. The judgment of the trial court in an action where the jury has been waived has the effect

of a verdict of a jury and will not be set aside unless clearly wrong.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge, Affirmed.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

Stephen A. Davis of Cassem, Tierney, Adams & Henatsch, John S. Samson, and Daniel G. Dolan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is a declaratory judgment action. The sole question involved is whether the defendant, Travelers Indemnity Company, insured a certain 1960 Cadillac automobile belonging to the defendant Robert S. Nielsen.

It is claimed that a soliciting agent of Travelers orally agreed in a telephone conversation with Nielsen shortly after the acquisition of the Cadillac by Nielsen to add said vehicle by endorsement to a previously issued policy covering a 1966 Volkswagen owned by Nielsen. Travelers denies such an agreement. The disputed fact issues were tried by the court without a jury. The trial court found in favor of Travelers. We affirm.

Nielsen testified he talked to the agent of Travelers by telephone and explained he had bought the car and wanted liability but not collision coverage on it, and that the agent told him he would take care of it. The agent denied knowledge of any such conversation and expressed his belief that there was no such conversation because if there had been there would have been some kind of follow-up on it. No additional policy or rider was issued. No billing was made for additional premium and none was paid. The evidence shows that Nielsen had purchased various types of insurance from the agency for a number of years and did not always pay specific billings but made payment on account from

time to time on request. The evidence further shows that prior to the alleged conversation Nielsen had been billed for the premium on the Volkswagen by a billing which specifically identified that car. The premium on the Volkswagen had not been paid at the time of the alleged conversation. About 1 month later Nielsen was billed again for the same amount. A month later he was again billed for the same amount plus the premium on a workmen's compensation policy. Nielsen explained that he did not pay specific attention to the contents of the billings. After the accident which gave rise to the coverage question the agent furnished an accident report form to Nielsen and to the plaintiff Belek, who was the driver of the Cadillac at the time of the accident, together with envelopes for mailing. The evidence indicates the accident reports were mailed to Travelers and that Belek at least completed and mailed to the Department of Motor Vehicles of the State of Nebraska Part II of the report. He indicated thereon coverage by Travelers Insurance Company policy No. 008 183 675, which other evidence indicates is the policy on the Nielsen Volkswagen. Following the accident Nielsen obtained a replacement automobile for the Cadillac and called the agent and caused this vehicle to be added to the Volkswagen policy. He was subsequently billed for this and paid the premium thereon. The evidence shows that Nielsen was once employed by an insurance agency and apparently had some familiarity with the conduct of such a business.

The trial court in its findings against the plaintiffs laid considerable weight upon certain aspects of the evidence as indicated by the following findings: "Nielsen indicated that he assumed that he had coverage on the Cadillac until he learned differently after the accident on August 23, 1967. . . . He made this assumption in spite of the notices of March 25 and April 25, 1967, and in spite of the fact that for a period of 6 months he had

received no policy covering the Cadillac and had paid no premium on such a policy."

We believe the facts recited in the court's findings considered in light of Nielsen's knowledge of the insurance business tipped the scales in favor of a conclusion that there had been no agreement to insure the Cadillac. The judgment of the trial court in an action where the jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N. W. 2d 267. Section 21-21,157, R. R. S. 1943, provides that when a declaratory judgment proceeding ". . . involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."

A stipulation was entered into by the parties as follows: ". . . if Anne Hanks, who is an Assistant Division Chief, Department of Motor Vehicles, State of Nebraska, were called to testify, she would testify according to her records that George C. Belek indicated here liability with the Travelers company by virtue of policy no. 8-183-675 at the time of this accident on August 23rd, 1967; that this office, to-wit, the Department of Motor Vehicles, Department of Motor Financial Responsibility, has not received a denial of that policy." The colloquy of counsel surrounding the stipulation indicates that the filing made by Belek refers to the Part II of the accident report referred to in section 60-506.01, R. R. S. 1943. That section reads as follows: "The Department of Motor Vehicles shall, within ten days after receipt of the report of the accident, forward Part II of such report, by United States mail, to the insurance company, if any, named in such report as furnishing liability insurance. Unless express denial of the truth of the statements shown on such Part II is received from the named insurance company by the Department of Motor Vehicles within the time limited by section 60-507 it shall be

presumed, for purposes of Chapter 60, article 5, that such statements are true and such presumption shall be accepted, when applicable, as satisfying the requirements of sections 60-508 and 60-509."

Plaintiffs contend that the filing of the Part II of the accident report with no subsequent denial by Travelers constitutes a conclusive certification that Travelers insured the automobile in question. Plaintiffs cite authorities for this proposition and Travelers cite contrary authorities. In the state of the record in this case we need not decide the question. Section 60-506.01, R. R. S. 1943, provides: "The Department of Motor Vehicles shall, within ten days after receipt of the report of the accident, forward Part II of such report, by United States mail, to the insurance company, if any, named in such report as furnishing liability insurance." The record does not disclose that the Department of Motor Vehicles ever complied with the above provision. Unless this is shown no duty of denial ever arises.

As we read the record there is no contention that Travelers filed an SR-21 under the alternative provisions of the statute contained in section 60-509, R. R. S. 1943, as follows: "Upon receipt of a notice of such accident, the insurance company or surety company which issued such policy or bond shall furnish, for filing with the department, a written notice that such policy or bond was in effect at the time of such accident."

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNSON KENNETH EVANS, APPELLANT.
191 N. W. 2d 145

Filed November 24, 1971. No. 37790.

1. **Criminal Law: Evidence: Trial.** In-court identification evidence is admissible where such identification is made on a basis independent of a tainted lineup.

2. **Criminal Law: Evidence: Witnesses.** A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant under circumstances free from taint.
3. **Criminal Law: Evidence: New Trial.** A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed.
4. ———: ———: ———. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
5. ———: ———: ———. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

Asserting that the eyewitness identification of the defendant was constitutionally defective, the suppression by the State of material evidence, and the excessiveness of the sentence, the defendant appeals from a conviction and sentence for robbery. We affirm the judgment and sentence of the district court.

About 11 a.m. on September 20, 1968, the West Lake Grocery, 4238 Lake Street, Omaha, Nebraska, was robbed. At the time of the robbery the sole occupants of the building were Arthur Haffke, the proprietor, and his son, an assistant, Warren Haffke. At 11 a.m. on that morning two negro men came into the store. They walked in the front door (one "in" and one "out" door),

came up to the counter, and asked where the milk was. The proprietor was behind the check stand. One of the men was tall and one was short. After being advised where the dairy bar was, both proceeded to walk down an aisle to the north side of the store where the milk was. Haffke, because of their conduct and because he smelled whiskey on the breath of the tall man when he talked to him, became suspicious, pulled his gun out from under the counter, and put it in his pocket. They were in the store for a period of 8 to 10 minutes. Haffke, his suspicions aroused, walked down the aisle and kept them under relatively continuous observation in a mirror which was posted so he could observe them across the width of the store. He observed them while they were talking right in front of the dairy bar. They talked for several minutes. At the same time, Warren Haffke, the son who was behind the meat counter directly adjacent to the dairy bar, had them under observation. After observing the two men in the mirror, Haffke walked back to the check stand and waited probably 4 or 5 minutes, at which time the defendant and his companion appeared at the check stand carrying a half gallon of milk. As Haffke opened the cash register he was pushed against the drug rack which was behind him. When he turned around the defendant had his hands in the cash register. Haffke pulled his gun and shot at the robbers as they started running toward the doors. The shorter man was hit and the tall man escaped. Haffke in court positively identified the defendant Evans as the tall man who was in the store and committed the robbery.

Warren Haffke, the son, was behind the meat counter. He saw the two men come into the store and walk to the back of the store where the dairy case was, and observed them during this period of time. From the meat counter he could see right down the aisle to the dairy case. The two men were in front of the dairy case and he observed them while they stood there talking

for perhaps a couple of minutes. At the end of their conversation he saw one man step away from the case and look around the aisles. After doing that he stepped back and walked up the aisle toward the meat counter. He was carrying a half gallon of milk. Warren Haffke's testimony corroborated in detail that of Arthur Haffke, the proprietor. There were some discrepancies, but he testified that there was a tall man and a short man; that the tall man was carrying a half gallon of Roberts milk, the same as Arthur Haffke testified; that the tall man was in front and the short man was behind him; that they went to the checkout stand and while at the checkout stand they were in his direct line of vision; and that he heard the tall man ask for a package of cigarettes and observed the rest of the circumstances as Arthur Haffke had related them. He actually saw the tall man push his father, he saw his father lose his balance, he saw the two men starting to run, and he saw his father shooting at them. Warren Haffke positively and unequivocally identified Evans as the tall man in the store. The argument that there is insufficient evidence to convict the defendant is obviously without merit and one that will not be further discussed.

Defendant's main contention in this appeal is that a new trial should have been granted because subsequent to the events related above, Arthur Haffke, the proprietor, was unable to identify the defendant when two colored pictures were shown to him by a police officer sometime later. Seizing on the fact that the police officer showed the proprietor, Arthur Haffke, a series of colored pictures for the purpose of identification sometime after the commission of the crime, the defendant argues strenuously that under the doctrine of United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, and other "line-up" cases require counsel's presence, identification by Haffke was constitutionally invalid and impermissible because there was a lack of sufficient foundation to show or permit an independent in-court

identification of the defendant by Haffke. There are two clear answers to this contention: (1) The doctrine of Wade, cited *supra,* is not applicable to photographic identification. State v. Moss, *ante* p. 391, 191 N. W. 2d 543. As that opinion points out the Second, Fifth, Seventh, Ninth, and Tenth Circuits have so held. See, United States v. Bennett, 409 F. 2d 888; United States v. Ballard, 423 F. 2d 127. (2) The doctrine of Wade does not apply to the present case as Arthur Haffke, in the present case, did not identify Evans, the defendant, from the photographs that were shown him. The basic premise of the Wade case is that improper "line-up" identification, without the presence of counsel, suffers from the "dangers inherent in eye-witness identification and the suggestibility inherent in the context of the pretrial identification."

We cannot infer an impermissible suggestiveness from the failure of identification. The foundation for an independent identification is much stronger here than in State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181. We deem it unnecessary to repeat the evidence in detail. Arthur Haffke's testimony as to the defendant being in the store for a period of 8 to 10 minutes, the rather lengthy hesitation at the dairy bar, the incident at the check counter, and the subsequent escape of the defendant, all corroborated in minute detail by the independent observations of Warren Haffke, furnish a foundation to support the admission of testimony as to in-court identification. There is no merit to this contention.

The defendant, on motion for new trial, offered evidence to support his contention that the state *suppressed* the fact that Arthur Haffke, the proprietor, had looked at some colored pictures presented by the police sometime prior to the trial and failed to identify the defendant Evans in one of these pictures. The trial court rejected this contention and we find no abuse of its discretion in this respect. Basically, the argument of the defendant rests upon the contention that there was a failure to

cross-examine the State's witness in this respect. There is no evidence of suppression. On the contrary, the record affirmatively discloses the very area of evidence which the defendant claims was suppressed or concealed. It overlooks the following testimony elicited by cross-examination of the witness Arthur Haffke by defense counsel at the preliminary hearing. It is as follows: "Mr. Carey: You never looked at any photographs of anybody? A. I looked at the photographs, yes. Mr. Carey: Where did you look at the photographs? A. At the store. Mr. Carey: Members of the police department brought those photographs out? A. Yes. Mr. Carey: How many photographs did you look at? A. One—one only—the big fellow. Mr. Carey: Do you recall the name of the police officers who showed that photograph to you? A. No. I can't. Mr. Carey: What did they tell you when they showed you that single photograph? A. They didn't show me a single photograph. He had a whole bunch. He said, 'Is that man in there that pushed you?' and I looked and I said, 'This one fellow that has died his hair yellow down the center here' (indicating). This is the fellow I picked out. Mr. Carey: You did see a photo then of an individual who had a yellow streak down the center of his hair, is that right? A. Yes. Mr. Carey: This same streak was there at the time he came in your store? A. No, not when he walked in the store. Mr. Carey: So you identified him by the streak down the hair? A. No, by his face. I wouldn't know one streak from another. Mr. Carey: So you will concede that the photograph which you observed didn't look exactly like the person you identified? A. Except for the hair-do. Mr. Carey: You indicate that you looked at only one photograph, but that is obviously incorrect. A. No, I looked at the whole bunch. Mr. Carey: But you identified only one man—A. That's right. Mr. Carey: (continuing) As a result of the photographs which you observed? A. That's right. Mr. Carey: How many photographs did you look at?

A. He had several. I don't know. He said, 'Is the man here that pushed you?' and he laid them there and I looked at them." There is no merit to this contention.

In an overlapping argument the defendant again argues that the claimed newly discovered impeachment evidence of Arthur Haffke's identification of the defendant is potent enough so that the court should have granted a new trial. Again, we find no abuse of the trial court's discretion in this respect. As we have pointed out there was no suppression or concealment by the State of this evidence and it is difficult to see how it could be deemed as "newly discovered" evidence. Putting aside rhetoric, the contention simply is that one of the prosecuting witnesses at some time prior to the trial was unable to recognize the defendant in a couple of colored Polaroid pictures taken some time previously. Human error in picture identification is common. But, more important, we observe that the testimony was only impeachment of one of the prosecuting witnesses. The contention that a new trial should be granted ignores the independent and strongly corroborated testimony of the witness, Warren Haffke, which has been recited in more detail heretofore. The translation, by a human being, from the visual physical identification of a defendant at the scene of the crime, into a recognition from a colored Polaroid photograph may indeed be difficult. At most, such impeachment goes to the credibility of the witness and is for the jury. Disparity of likenesses from a photograph, in this case a colored Polaroid, and the actual physical appearance of a human being is a matter of common knowledge. His actual physical identification of the defendant could not have been in any way enhanced by his failure to identify the colored Polaroid photograph. In light of the strong and persuasive in-court identification by Warren Haffke and the detailed independent corroboration by Arthur Haffke's testimony, we cannot hold that this claimed newly discovered evidence by way of impeach-

ment is so potent that it was an abuse of discretion by the trial court to refuse to grant the new trial. We have also stated that a new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. These rules were all summarized recently in State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69, where this court said as follows: "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. Smith v. State, 169 Neb. 199, 99 N. W. 2d 8; Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. New cumulative evidence tendered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298; Gates v. State, 160 Neb. 722, 71 N. W. 2d 460; Smith v. Smith, supra. A new trial will not ordinarly be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. Baskins v. State, 139 Neb. 803, 299 N. W. 188; Ogden v. State, 13 Neb. 436, 14 N. W. 165." See, also, State v. Haynes, 186 Neb. 238, 182 N. W. 2d 199.

The trial court observed and heard the witnesses and observed the defendant in the course of the trial. It was unable to find any error or prejudice sufficient to grant a new trial arising from any failure to prove that one of the prosecution witnesses failed to identify the defendant from pictures taken before the trial. We can find no abuse of discretion in this determination and it is without merit. Eyewitness identification has, throughout history, been subject to possible human error. Nevertheless, discrepancies and errors in identification where there is an adequate foundation, are matters for a jury determination.

The defendant attacks the sentence as excessive. The

presentence investigation of this defendant is a part of the record. It is true that he was honorably discharged from the military service. It is also true that the present crime committed was committed while the defendant was on probation from another offense. It is also true that the present offense, robbery, is a serious crime and involved the actual use of physical violence by the defendant. The maximum sentence is 50 years and the minimum sentence is 3 years. The trial court observed the conduct and demeanor of the defendant and heard the evidence. We are not prepared to say that the trial court abused its discretion in imposing the sentence of 5 to 7 years.

Other contentions of the defendant have been examined and are without merit. The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN WALKER, APPELLANT.
191 N. W. 2d 817

Filed November 24, 1971. No. 37910.

1. **Criminal Law: Evidence.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto.
2. ———: ———. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.
3. **Criminal Law: Evidence: Witnesses: Appeal and Error.** It is not the province of this court to pass on the credibility of witnesses or weigh the evidence in a criminal case.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for breaking and entering a motor vehicle with intent to commit larceny. The only question presented by the appeal is the sufficiency of the evidence to sustain the conviction.

The record shows that an automobile owned by Frank Wolczak was broken into on August 16, 1970, and a radio removed from the automobile. At the time of the offense the automobile was in a parking lot near the University of Nebraska Medical Center in Omaha, Nebraska, where Wolczak was employed as a security guard. At about 3:40 a.m., Wolczak discovered that the radio had been removed from his automobile and notified the police.

At about 4 a.m. of the same day, Officers Garaczkowski and Sommer were on patrol in the vicinity of Thirtieth and Cuming Streets in Omaha, Nebraska. They observed a black Plymouth automobile proceeding without any lights. As the automobile passed the police cruiser at Thirty-first and Nicholas Streets, the officers noticed that the passengers in the rear seat appeared to be "shuffling around" as if they were putting something down in the back seat. They stopped the automobile just north of the intersection and observed there were some articles on the rear floor of the automobile partially covered by a banket. When the blanket was removed they found the radio taken from the Wolczak automobile, a stereo tape player, 9 stereo tapes, and a pair of surgical nail clippers.

The automobile belonged to the defendant. It was being operated by Leon McBride. Felton Phelps was sitting on the right side of the front seat. Jesse James Davis was sitting on the left side of the rear seat, and

the defendant was sitting on the right side of the rear seat. The radio and other articles were on the floor between Davis and the defendant. The defendant, who was arrested and taken to the police station, did not appear to be intoxicated.

Davis was called by the defendant and testified that he and Phelps had broken into the Wolczak automobile and taken the radio; that the defendant had nothing to do with the breaking and entering of the Wolczak automobile; that the defendant was asleep in the rear seat of the black Plymouth automobile at the time the Wolczak automobile was broken into; and that the defendant did not awaken until the automobile had been stopped by the police. Davis also testified that he had been with the defendant, off and on, from about noon on the preceding day, and that the four were together from midnight until they were picked up by the police.

The defendant testified that he owned the Plymouth automobile; that he and Phelps were together during the evening of August 15, 1970; that Davis and McBride were together and that the four of them got together at about 1 a.m.; that he drank a quart of beer at about 9 or 10 o'clock; that they picked up McBride's girl friend at about 1 a.m. to take her to the hospital; that he remembers nothing after that until he was awakened by the police shining a light in his face; and that he was sleeping because he had been drinking.

The evidence shows that the defendant and his companions had been together for several hours before the crime was committed. It is undisputed that the defendant was present at the scene of the crime. The defendant's automobile was being used to transport the stolen property and the four men were apprehended within a very short time after the break-in had occurred. The defendant's claim that he was sleeping and intoxicated was contradicted by the testimony of the police officers.

A common purpose among two or more persons to commit a crime need not be shown by positive evidence

but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto. Miller v. State, 173 Neb. 268, 113 N. W. 2d 118. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. As we view the record, the evidence presented a question for the jury as to the defendant's participation in the offense committed by Davis and Phelps. It is not the province of this court to pass on the credibility of witnesses or weigh the evidence in a criminal case. State v. Warner, *ante* p. 335, 190 N. W. 2d 786.

The judgment of the district court is affirmed.

AFFIRMED.

DOYLE L. HACKER, APPELLANT, V. RAMIRO A. PEREZ, APPELLEE.

192 N. W. 2d 166

Filed November 24, 1971. No. 38014.

1. **Trial: Evidence: Verdict.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.
2. **Automobiles: Negligence.** Conditions affecting the visibility of a motorist impose upon the driver the duty to use a degree of care commensurate with the existing circumstances.
3. **Automobiles: Negligence: Evidence.** Circumstantial evidence is sufficient to sustain a charge of unlawful speed and may be sufficient to overcome direct evidence.
4. **Automobiles: Negligence: Statutes.** The operator of a motor vehicle who would otherwise have the right-of-way under statutory regulations if he operates it at a lawful rate of speed may forfeit the right-of-way if he operates the vehicle at an unlawful rate.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. Affirmed.

Van Steenberg, Winner & Brower, for appellant.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an action to recover damages as the result of a collision at an unprotected intersection of two graveled county roads 6 miles north and 3 miles east of Scottsbluff, Nebraska. Plaintiff, Doyle L. Hacker, appeals from a judgment entered on a jury verdict for the defendant, Ramiro A. Perez. We affirm.

Plaintiff sets out seven assignments of error. However, only one is argued in his brief: The trial court should have directed a verdict for the plaintiff. If the trial court had done so, it would have constituted reversible error.

In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Napier v. Pedersen, 175 Neb. 703, 123 N. W. 2d 577.

Plaintiff's son, Rex S. Hacker, about 3 p.m., on June 29, 1969, was driving plaintiff's automobile from the south, approaching the intersection in question. At the same time the defendant was approaching from the west. Rex testified he was traveling 40 to 45 miles per hour and did not decrease his speed as he approached the intersection. He has no recollection of seeing the defendant's automobile.

Defendant testified he was traveling 20 to 25 miles per hour and slowed down for the intersection. He saw no car when he first looked as he approached the intersection but continued to look and finally saw a car approaching from the south. He tried to avoid a collision by applying his brakes and swerving to the north.

The evidence would indicate that from the direction the two cars were approaching, the intersection is almost a blind one. In any event, it is extremely difficult to detect approaching traffic from either the south or the west.

While Rex testified he could not recall seeing defendant prior to entering the intersection, his car left skid marks for 56 feet to the point of impact. Either he saw the defendant's vehicle or realized he was approaching a bad intersection. Defendant's vehicle skidded 22 feet to the point of impact. Defendant's car traveled 18 feet into the intersection, and the front of the car was within 4 feet of the east edge of the intersection. The front of the plaintiff's car was only 2 feet 6 inches into the intersection at the time of impact. Using these measurements and considering as a minimum the admitted speed and reaction time of the participants, we could fairly assume Rex observed the defendant's vehicle when he was at least 100 feet from the intersection, while the defendant observed the plaintiff's automobile approaching when defendant was at least 22 feet from the intersection. Defendant's vehicle was almost across the intersection when Rex entered it because plaintiff's car only traveled 2½ feet to the point of impact.

While Rex testified he was driving 40 to 45 miles an hour, the physical facts, including the extensive damage to the vehicles, would support an inference of a much greater speed. In any event, the speed of an automobile is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits. Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556. In this respect our law is clear that questions affecting the visibility of a motorist impose upon the driver the duty to use a degree of care commensurate with the existing circumstances. See Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498. As suggested by Costanzo, it is well settled that circumstantial evidence is sufficient to sustain a charge of unlawful speed and may be

sufficient to overcome direct evidence. It is not unreasonable to assume that the jury found Rex was traveling at a speed greater than was lawful and prudent under the conditions which existed at the intersection in question, and consequently did not have his automobile under reasonable control.

Plaintiff assumes because Rex approached the intersection from the right, a verdict must be directed for him. The facts in this case do not undisputedly give him the right-of-way. They present a jury question which was resolved against the plaintiff. The operator of a motor vehicle who would otherwise have the directional right-of-way under statutory regulations if he operates it at a lawful rate of speed may forfeit that right-of-way if he operates the vehicle at an unlawful rate. In so holding, we are not unmindful that section 39-751(2), R. R. S. 1943, was repealed previous to the date of the accident herein. The new statutory section says nothing about forfeiture of right-of-way by unlawful speed, but that holding is inherent in other regulations covering right-of-way. Those rules must be construed within the ambit of lawful operation of motor vehicles. We have said on many occasions the fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left. The rules of the road which are applicable herein are stated and discussed in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. TRAMBLE, APPELLANT.
191 N. W. 2d 822

Filed November 24, 1971. No. 38026.

1. **Criminal Law: Trial: Evidence.** The question of whether a pretrial photographic identification procedure was impermissibly

suggestive must be determined by an evaluation of all the surrounding circumstances.

2. **Criminal Law: Right to Counsel.** There is no right to counsel at a pretrial photographic identification.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for robbery. The assignments of error relate to pretrial photographic identification of the defendant by the complaining witness.

The record shows that at about 3 a.m., on July 17, 1970, Earl Clare Williams was driving south on Twenty-fourth Street in Omaha, Nebraska, when his car was "curbed" by another automobile. One man reached through the window and grabbed Williams by the collar while the defendant entered the Williams automobile through the right front door and demanded that Williams give the defendant his money, watch, and ring. A third man, carrying a gun, approached the Williams automobile from the rear. After Williams had handed his money, watch, and ring to the defendant, he was told to drive on. He then drove to the police station and reported the robbery.

Williams testified that the defendant was in his automobile for about 3 minutes; that the area was lighted by street lights; that the defendant was a "colored fellow," about 6 feet tall; and that he had a thin face, a goatee with sideburns, and was graying at the temples. At the trial Williams identified the defendant as the man who had entered his automobile and robbed him.

At the pretrial hearing, Williams testified that on the

night of the robbery he was shown about 30 photographs at the police station but did not identify any of them as being a picture of the defendant, the man who had robbed him.

The ring was pawned by the defendant on July 20, 1970, using the alias of "Ted Williams." On July 22, 1970, Earl Clare Williams went to the pawn shop and identified the ring as the one that had been taken from him in the robbery. On the same day he looked at a number of photographs at the police station. He was unable to identify any of them as being a photograph of the defendant. There was one picture that resembled the defendant but the person in the photograph appeared to be younger and heavier than the defendant and was clean shaven. There is some confusion in the record as to this latter photograph but, apparently, it was a photograph of the defendant made in 1961.

The defendant was arrested on the afternoon of July 22, 1970, and placed in a police cruiser. Later, the watch that had been taken from Williams in the robbery was found underneath the seat cushion of the police cruiser in which the defendant had been placed at the time of the arrest.

On July 23, 1970, Williams was notified by the police that "they had the man" and Williams was asked to come to the police station to identify him. When Williams arrived at the station he was advised that the prisoner would not consent to a lineup, and Williams was shown four black and white photographs. Out of this group, Williams correctly identified one photograph as being a picture of the defendant. Williams was then shown a group of five colored photographs. Out of the second group, Williams correctly identified two photographs as being pictures of the defendant.

The defendant contends that the photographic identification procedure followed in this case was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. The question must be determined by an evaluation of all the surrounding cir-

cumstances. Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247.

On the first two occasions when photographs were shown to Williams at the police station, the defendant was not in custody. On the third occasion the defendant had refused to participate in a lineup and his refusal stands undenied in the record. Under such circumstances there is no alternative to photographic identification.

The record does not sustain the defendant's contention that the procedure followed was impermissibly suggestive. The photographs which were used on the third occasion were pictures of negro men of reasonably similar appearance. By separating the photographs into two groups, the police lessened the likelihood of misidentification. The photographs were in no particular order within each group, and the top photograph in each group was not a photograph of the defendant.

The defendant's other contention in regard to a right to counsel at the time of a photographic identification was considered and rejected in State v. Moss, *ante* p. 391, 191 N. W. 2d 543. See, also, United States v. Richmond, 449 F. 2d 288 (8th Cir., October 4, 1971).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES EICKMEIER, APPELLANT.
191 N. W. 2d 815

Filed November 24, 1971. No. 38051.

1. **Criminal Law: Evidence: Trial.** To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established

thereby, and inconsistent with any reasonable hypothesis of innocence.

2. **Criminal Law: Evidence: Trial: Verdict: Appeal and Error.** After a jury has considered the evidence in the light of the foregoing rule and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
3. **Criminal Law: Evidence: Trial.** When a fact in issue may be explained by the production of an article or object to which testimony relates, it is proper to produce such object or article and exhibit it to the jury.

Appeal from the district court for Kearney County: EDMUND NUSS, Judge. Affirmed.

Tye, Worlock, Tye, Jacobsen & Orr, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Charles Eickmeier, was convicted of burning his trailer home to defraud an insurer. Defendant argues two assignments of error: The insufficiency of the evidence, and the lack of a proper foundation for the admission of an exhibit. We affirm.

The evidence against the defendant is in the main circumstantial. However, defendant's brother-in-law testified that the defendant had told him he was going to burn down his trailer house. When he told how he expected to do it, the brother-in-law jokingly suggested that he do it like a woman would, by leaving a frying pan on the stove. The fire in this instance appears to have been started by overheating cooking oil in a fry pan, as suggested by defendant's brother-in-law.

In State v. Williams, 183 Neb. 257, 159 N. W. 2d 549, we said: "To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances

essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.

"After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt."

Without reviewing the evidence in detail, we find it does sustain a rational theory of defendant's guilt and is sufficient to sustain his conviction.

Defendant argues no proper and sufficient foundation was laid for the admission of a screwdriver into evidence. The screwdriver was a common 10-inch screwdriver, found in a wastebasket in the trailer. There were some marks on the trailer door tending to indicate that someone had tried to enter the trailer home. The screwdriver exactly fit the marks on the door. It was defendant's position that the trailer had been broken into and the fire started by the intruder. The evidence, however, is conclusive that the door had not been sprung and entrance had not been gained to the trailer by forcing the door. While it could not be proved with certainty that the screwdriver in question actually made the marks, it is indisputable that they were made at least by an exact duplicate of the one in evidence. In any event, when a fact in issue may be explained by the production of an article or object to which testimony relates, it is proper to produce such object or article and exhibit it to the jury. Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF STACY AND SHERRY LYNN NAIMIE, CHILDREN UNDER 18 YEARS OF AGE.
MICHAEL P. HEALEY, APPELLEE, V. KAREN SUE NAIMIE, APPELLANT.
192 N. W. 2d 137

Filed December 3, 1971. No. 37941.

1. **Parent and Child: Infants.** Parental rights may be terminated when parents have substantially and repeatedly neglected a child and refused to give it necessary parental care and protection or when a parent is unfit by reason of lewd and lascivious behavior which is detrimental to the health, morals, or well-being of the child.
2. **Parent and Child: Infants: Statutes.** The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purpose of serving the best interests of the children involved.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

John S. Samson and Wendell Janssen, for appellant.

Donald L. Knowles, Colleen R. Buckley and Norman Denenberg, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action instituted in the separate juvenile court of Douglas County, Nebraska, praying that Stacy Naimie and Sherry Lynn Naimie born out of wedlock on February 7, 1969, and February 2, 1970, respectively, be found to be dependent and neglected children and further praying that the parental rights of their 19-year-old mother, appellant herein, be terminated. The court found that the children were dependent and neglected children, terminated the parental rights of the natural parents, and placed the children in the temporary custody of the Douglas County welfare administration for care, education, and maintenance in a suitable foster

home. The only question presented is the sufficiency of the evidence. We affirm the judgment of the separate juvenile court.

The petition, in Count I, alleges as defined in section 43-201 (2), R. R. S. 1943, that the children are dependent, to-wit: "Said children are without proper support and parental care from Karen Sue Naimie, natural mother of said children through no fault of said natural mother who is unable to provide proper support and parental care for the said children."

In Count II, they are alleged to be neglected because their natural mother on five occasions left them in the care of their maternal grandmother with no "arrangement for their care and maintenance," knowing that the grandmother "was incapable of caring for said children because of her ill health."

The evidence reveals that the children were born out of wedlock. The mother identified the father of Sherry but said she did not know who was the father of Stacy. There is other evidence identifying the two fathers. It conclusively appears that neither father has acknowledged his child nor contributed to her support and the judgment of the separate juvenile court terminating their parental rights in the children must be affirmed on the basis of neglect.

The mother, Karen Sue Naimie, was an unmarried woman, 19 years of age. She and the children lived with Karen's mother in a two-bedroom house, also occupied by a brother of Karen's who it appears was mentally unstable. The maternal grandmother was 43 years of age and maintained that she was in ill health due to high blood pressure and consequently unable to care for the children. There is no verification by a doctor of her condition and Karen maintains her mother is simply lazy.

The grandmother's objection to caring for her grandchildren made it impossible for Karen to obtain work although after the children were removed from her custody, Karen still failed to obtain employment over a 5½-month

period. On five separate occasions, from March 7, 1970, through August 1970, Karen left her mother's home without saying where she could be reached or when she would return. She would be gone overnight for one to three days and her whereabouts on all but one occasion remained unexplained. The last such occurrence was on August 27, 1970, and the following day Karen's mother called the Douglas County welfare department and had the children taken away. They have since been in a foster home.

On two occasions Karen left her mother's home and took the children with her. On one occasion she rented an apartment which she occupied for not to exceed one month and was unable to pay the rent in full. While there she was observed in bed with one of the two alleged fathers of her children, a married man. On the other occasion she moved in with Shirley Sweeney who had several children of her own. All of the children were on occasion left in the care of an 11-year-old son of Shirley Sweeney and on one such occasion, an emergency developed requiring hospitalization of the baby Sherry. While the children were in a foster home, Karen called to see them on four occasions. On one such occasion, she was accompanied by a married man she introduced as her boyfriend. There was also evidence that the oldest child Stacy, when first placed in the foster home, had the habit of placing objects between her legs and simulating sexual movements. There is some indication that Karen was "running wild" and Karen herself stated that one of the children's alleged fathers stated: "* * * that if I straightened up and started getting a job he would help me out as much as he possibly could." The evidence recited in this paragraph appears to extend beyond the allegations of the petition but was not objected to.

All witnesses agreed that Karen at all times kept the children clean and adequately fed and clothed and it is not disputed that she loved them.

Section 43-209, R. R. S. 1943, provides for the termination of parental rights under certain specific circumstances. This may be done when parents have substantially and repeatedly neglected a child and refused to give it necessary parental care and protection or when a parent is unfit by reason of lewd and lascivious behavior which is detrimental to the health, morals, or well-being of the child.

In the present instance, it appears that Karen Sue Naimie was not unduly neglectful of her children due to the incidents mentioned in the petition. She always left the children, during her absence, in the care of their grandmother and although the grandmother objected to this, it is apparent that the children were adequately cared for. There is, however, a broader aspect of this case which should not be ignored. The petition contains general allegations of dependency and neglect. It stands unchallenged either in the separate juvenile court or in this court. We deal here with a young mother of two children born out of wedlock. The first was conceived when she was only 17 years of age and the second about 3 months after the birth of the first. A wayward and irresponsible tendency on her part is apparent. That she is continuing this irresponsible conduct is demonstrated by her persistent association with married men, her evident refusal to obtain employment and support either herself or her children, her unexplained absences, and the effect her association with men had on Stacy, the oldest child. Under the circumstances, it appears that Karen Sue Naimie is at present unable or unwilling to give her children proper parental care and protection and that she is unfit by reason of lewd and lascivious behavior which is detrimental to her children's morals to have their custody. The child-custody statutes of the State of Nebraska are to be liberally construed to accomplish the purpose of serving the best interests of the children involved. See State v. Randall, *ante* p. 64, 187 N. W. 2d 586.

We find that the record sustains the judgment of the separate juvenile court and that the judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYNN M. MOORE, APPELLANT.

192 N. W. 2d 155

Filed December 3, 1971. No. 37979.

1. **Criminal Law: Trial: Evidence.** Evidence of a crime like the one charged against an accused is admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
2. ———: ———: ———. Whether such other crimes are too remote is determinable by the exercise of judicial discretion, the limits of discretion being set by the facts of each case.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Frank E. Piccolo, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found Lynn M. Moore guilty in a criminal prosecution for issuance of a no account check. On appeal for error he assigns admission in evidence of two other checks issued by him.

Moore issued the check described in the information upon First Security Bank of Sutherland for $153 on July 5, 1969. He had maintained an account there only from November 1949 to March 1951 when his credit balance fell to nothing.

One of the other checks was issued by Moore on the

First Security Bank for $12.35 on January 1, 1968. The second check, exhibit 7, was drawn by him on that bank for $15 on December 30, 1967. The bank's rejection slip on exhibit 7 indicated insufficient funds by a mark on the slip but with a handwritten notation "N.P. St.".

Evidence of a crime like the one charged against an accused is admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203 (1968). Whether such other crimes are too remote is determinable by the exercise of judicial discretion, the limits of discretion being set by the facts of each case. State v. Rich, 183 Neb. 128, 158 N. W. 2d 533 (1968); United States v. Corry, 183 F. 2d 155 (2d Cir., 1950).

"To prove Intent, . . . including the various non-innocent mental states accompanying different criminal acts, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates . . . innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . . similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative . . . (an) innocent mental state . . .; and the force of each additional instance will vary in each kind of offence according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent." II Wigmore on Evidence, § 302, p. 196 (3d Ed., 1940).

Admission in evidence of exhibit 7, at least in light of the bank record of no account, was not prejudicial error. Moore's other contentions are not well taken.

AFFIRMED.

LIDA MAE SCHUMAN, APPELLANT, V. GEORGE F. SCHUMAN, APPELLEE.

192 N. W. 2d 150

Filed December 3, 1971. No. 37980.

Divorce: Appeal and Error. The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellant.

Atkins, Ferguson, Nichols and Hahn, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a divorce action in which the only question presented is the propriety of the property settlement awarded to plaintiff by the court. We affirm the judgment of the district court.

Plaintiff and defendant were married on December 30, 1963, and separated on May 27, 1970. Defendant was a farmer 61 years of age at the time of the divorce hearing and had been previously married. It was plaintiff's third marriage and she had two grown sons by a former marriage. At the time of the marriage, plaintiff had assets consisting of a checking account in the sum of $715.59, a certificate of deposit of $10,000, a savings account of $7,080, indebtedness due her from her son Graham Darnell in the sum of $5,000, and a farm subsequently sold for $26,000, totaling $48,795.59. She made further loans to her sons and at the time of the divorce hearing, they owed her respectively $17,500 and $7,000. She had during the marriage made gifts to her sons. One received a credit on his indebtedness of $10,000, reducing it to the $7,000 balance mentioned, and the other received

$10,000 in cash. She had cashed certificates of deposit in May 1970. Out of this she made the $17,500 loan to one son. Her assets, including gifts to her sons, totaled $44,500. All of this property was awarded to her and, in addition, she received monthly support totaling $1,466 and a judgment for $11,000 made a lien on defendant's farm. Under the decree, she has received, including the gifts to her sons, the sum of $56,966, together with minor items of personal property.

At the time of the marriage, defendant owned a 160-acre farm, a bank account of $250, an account receivable of $500, cattle and grain of the value of $15,310, machinery, a horse, and equipment of the value of $9,860, and owed a bank note of $1,000. These assets, less the indebtedness and farm value, amounted to $25,170. At the time of the divorce, he had a bank account of $3,206.42, certificates of deposit of $10,000, cattle and grain valued at $10,753.75, a horse, equipment, and machinery valued at $6,640, or personalty amounting to $30,600.17. In addition, he had the farm the value of which was enhanced by improvements erected or installed during the marriage in the sum of $9,000. The farm, without the improvements, was valued at $23,000. Value of the farm at the time of the marriage does not appear but assuming it was the same, or $23,000, his total assets when married were of the value of $48,170, and when divorced, $62,600.17. The judgment lien on the farm would reduce these assets to $51,600.17.

It appears that plaintiff has received all of the assets she had at the time of her marriage, and, in addition, has received other assets of a value in excess of $8,000. "The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown." Passmore v. Passmore, 144 Neb. 775, 14 N. W. 2d 670.

We are of the opinion that plaintiff has been fairly dealt with and that the judgment of the district court

should be affirmed. The allowance of an attorney's fee has not been requested and none is allowed.

AFFIRMED.

EDWARD A. JINDRA, APPELLEE, V. S.M.S. TRUCKING CO., A CORPORATION, ET AL., APPELLANTS.
192 N. W. 2d 139

Filed December 3, 1971. No. 37986.

1. **Motions, Rules, and Orders: Appeal and Error: Continuances.** A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed.
2. **Torts: Damages: Evidence.** A person injured by the negligence of another and claiming the right to recover for future pain and suffering and permanent disability can recover for such of the elements as the evidence shows are reasonably certain to be experienced in the future.

Appeal from the district court for Stanton County: MERRITT C. WARREN, Judge. Affirmed.

Deutsch & Hagen and Thomas H. DeLay, for appellants.

George H. Moyer, Jr., of Moyer & Moyer, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an action for property damage and personal injury growing out of a truck and farm tractor collision on a public highway. The plaintiff is the owner and operator of the tractor. The defendants are the owner and driver respectively of the truck. The jury returned a verdict in the amount of $2,745.80 for the plaintiff and the defendants appeal. Ten assignments of error are made but they boil down to two issues which are: (1) Did the trial court abuse its discretion in refusing to

grant the defendants a continuance because of the unavailability of the defendant Nelson as a witness. (2) Was the evidence sufficient to submit to the jury the questions of future pain and suffering and permanent disability. Contingent upon the determination of this issue is the related question of the propriety of the relevant instructions to the jury. We affirm.

On November 19, 1970, 4 days before the trial date, the defendants' attorney filed a motion for a continuance founded upon the unavailability of the defendant Nelson as a witness. The affidavit in support of the motion shows the case was referred to counsel on October 10, 1968, by the insurance carrier of the defendants; at that time the defendant trucking company was bankrupt and had been dissolved, and information was furnished to counsel that Nelson lived at a certain address in Fremont, Nebraska; in September 1969, a letter was mailed to Nelson at his Fremont address notifying him that the case was on the trial list; later during that month counsel was notified by Nelson's mother that he lived in Arizona, that she had heard from him by telephone, and he had stated he would come to testify if his expenses were paid; the case was then continued for various reasons; in October 1970, the insurance carrier began to try to locate Nelson who had moved without leaving an address; efforts to locate Nelson had failed; and apparently at no time had there been any personal communication between counsel and Nelson. The court denied the continuance because it "was not timely filed, that there was no showing that the Defendant, Henry J. Nelson, would or could be present at a later time and for the further reason that said case has been on file since August 19, 1968, and has already been passed for trial through three terms and is the oldest case for trial on the docket * * *." A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed. White Motor

Co. v. Reynolds, 179 Neb. 91, 136 N. W. 2d 437. We cannot say that there was any abuse of discretion in this case.

The evidence on issue (2) is substantially as follows: The collision caused the plaintiff to bump his head against the tractor cab and he was bounced around in the cab. The plaintiff testified: "Well, I had a bump on my head, and then my shoulder hurts. It hurt then and it still does." He could not work much the next day. He sought medical assistance a couple of months later. He saw the doctor twice. Pills were prescribed. He next consulted a doctor about 2 years later, apparently in preparation for trial. He saw him twice. Before the accident he had no trouble with his neck and shoulder. The shoulder still hurt at trial time. The pain is between the base of the neck and the tip of the shoulder. It interferes with hard work such as "pitch corn, use a fork or shovel or raise something heavy." He has to have extra help on this account.

The physician who examined the plaintiff on the two occasions within a few months before trial was the only medical witness. He testified that X-rays disclosed a very minimal arthritis on the vertebrae of the neck and that he had no opinion as to the cause or whether it antedated the accident. He then testified (seemingly contradictorily) that the accident aggravated the condition. Without objection to foundation or otherwise he then testified: "Q Doctor, do you have an opinion as to whether or not Mr. Jindra will continue to suffer pain as a result of the accident on May 18, 1968? A Yes. Q Would you give us your opinion, please. A Yes, he will. . . . Q And would you describe for the Court and Jury, please, Doctor, what disability that he was experiencing when you last saw him? A He complained to me of the same disability he had at the time of his examination approximately two months earlier, limitation of motion of the left shoulder and pain up into the neck from—shoulder and neck. I found no change." He estimated

the plaintiff's disability at 15 percent of the body as a whole. He further testified that on the occasion of his last examination of the plaintiff he found no change in plaintiff's condition. Again without objection he testified: "Q Doctor, what are the prospects in your opinion, and again within a reasonable medical certainty, for improvement in Mr. Jindra's condition? A I must be guarded; I would expect him to continue to have trouble, but I can't testify that he will," and further stated that as long as plaintiff continued farming it is reasonably medically certain that his disability will continue and he will continue to have pain. On recross examination he stated he could not state the extent of aggravation. On redirect he stated that the limitation of motion in the shoulder has caused "pain and inflammatory changes in muscles" and "the muscles of the neck are tightly packed around the cervical spine, and an injury or a swelling or an irritation of the joints of the cervical spine will in turn cause inflammatory change in the muscles and then they will go into a sort of a spasm: and when they do, the motion of that muscle is limited." Again without objection he testified: "Q Doctor, will you tell the Court and Jury whether or not this limitation of motion to which you have referred in your opinion, again within a reasonable medical certainty, is caused by the injury that Mr. Jindra suffered in the accident on May 17, 1968? A Yes."

The defendants essentially argue that because the doctor testified that he could not state the arthritis preceded the accident there is no basis for the testimony of aggravation and therefore the testimony is legally insufficient. This overlooks the fact that the doctor's testimony was based on his acceptance of the plaintiff's statement as shown by the history he took that the plaintiff had no symptoms prior to the accident and they started at that time. As already noted the plaintiff testified that he had had no prior problems.

The court instructed the jury as follows: "You will

disregard any reference during the trial of this case to any statement about the aggravation of a pre-existing arthritic condition, and you shall not allow any damages for pain and suffering or for disability resulting from any such arthritic condition." The jury could find under the evidence that the plaintiff's symptoms and disability were wholly caused by the accident and the injuries suffered at that time.

The defendants assign as error the refusal of the court to give their requested instruction No. 1. The substance of the requested instruction was given in the instruction quoted above. There is no error here.

The defendants assign as error the giving of the instructions submitting to the jury the questions of future pain and suffering and permanent injury. The doctor's opinion on these points previously referred to and to which no objection was made as to foundation or otherwise was sufficient for these issues to be submitted and to support a finding by the jury that the plaintiff would suffer future and/or permanent pain, suffering, and disability. The testimony of the doctor was not without probative force. The jury was properly instructed that plaintiff could recover for such of these elements as were "reasonably certain to be experienced in the future." This is the test. Boardman v. McNeff, 177 Neb. 534, 129 N. W. 2d 457. The instructions given are those approved by rule of this court. There is no error here.

Defendants assign as error the instruction given by the court on reducing damages for future pain and disability to their present worth. The instruction given was that approved by rule of this court. There is no error here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYNN M. MOORE, APPELLANT.
192 N. W. 2d 157

Filed December 3, 1971. No. 37994.

Post Conviction: Appeal and Error: Criminal Law. Where a defendant in a criminal case invokes our appellate jurisdiction, no post conviction remedy is then available to him. The post conviction remedy is cumulative, not concurrent.

Appeal from the district court for Lincoln County: JACK H. HENDRIX, Judge. Affirmed.

Frank E. Piccolo, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The district court denied Lynn M. Moore relief in this post conviction proceeding. It decided that Moore had taken sufficient steps to lodge an appeal to this court in the criminal case. On appeal in this post conviction proceeding he assigns the decision for error.

On an affidavit of poverty Moore was represented by the public defender of Lincoln County in the district court, Judge Stuart presiding. Imposition of sentence and overruling of the motion for new trial occurred October 20, 1969. At the hearing Judge Stuart advised Moore that the latter without cost might lodge an appeal upon filing an affidavit of poverty. The judge also stated that in a noncapital case no provision existed for "an attorney to represent an indigent defendant upon a public appointment basis on an appeal . . . . to the Supreme Court."

In November 1969, Moore in a letter to Judge Stuart set out his intent to appeal, his indigency, and a request for counsel. The letter was filed with the clerk of the

district court on November 19. The transcript contains a reply from Judge Stuart to Moore. The reply again advised Moore that he was not entitled to an attorney at public expense. It continued: "In my opinion the letter you wrote me is not an affidavit since it is not sworn to before a Notary Public, and you do not state therein that you are unable by reason of poverty to pay the costs. Therefore, it is my opinion that you have not perfected an appeal." See, §§ 25-1912 and 29-2306, R. R. S. 1943.

The State impliedly concedes, as it must, that Moore lodged an appeal to this court in the criminal case. See State v. Williams, 181 Neb. 692, 150 N. W. 2d 260 (1967). We decide that appeal this date. See State v. Moore, *ante* p. 498, 192 N. W. 2d 155. Moore's contention is without merit.

Where a defendant in a criminal case invokes our appellate jurisdiction, no post conviction remedy is then available to him. The post conviction remedy is cumulative, not concurrent. See State v. Williams, *supra*.

AFFIRMED.

FRANCIS EVERETT BRANDER, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THOSE OTHER UNDERWRITERS AT LLOYD'S, LONDON, WHO ARE SIGNATORY TO THE COVERAGE REPRESENTED BY CERTIFICATE NO. 501629, ISSUED TO EAGLE RACEWAYS, INC., APPELLANT, V. EAGLE RACEWAYS, INC., A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH LOUIS QUATTROCCHI, APPELLANT.

192 N. W. 2d 142

Filed December 3, 1971. No. 37997.

1. **Trial: Estoppel.** A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.
2. **Trial: Insurance.** A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they

are clear they will be applied according to their plain and ordinary meaning.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Cline, Williams, Wright, Johnson & Oldfather, for appellant Brander.

Joseph J. Cariotto, for appellant Quattrocchi.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Johnston, Grossman & Johnston, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a declaratory judgment action brought in behalf of the underwriters insuring, through Lloyd's, London, Eagle Raceway, Inc., of Eagle, Nebraska, to determine liability, if any, to defend and indemnify Louis S. Quattrocchi, a racing driver, against an action for injuries sustained by another racing participant Lynch Guy Hollamon. We affirm the judgment of the district court in favor of plaintiff.

Hollamon was coowner of an automobile participating in races at the Eagle Raceways, Inc., track. While in the pit area adjacent to the track, he was injured when Quattrocchi, then participating in a race, lost control of his car, catapulted into the pit area, and struck Hollamon. Hollamon brought action against Quattrocchi and Eagle Raceways, Inc. This action has been dismissed as to the latter and is a companion case to that of Hollamon v. Eagle Raceways, Inc., *ante* p. 221, 188 N. W. 2d 710.

Two questions are presented. Defendant Quattrocchi contends that plaintiff cannot be heard in Nebraska courts because it has not fulfilled statutory requirements pertaining to alien or foreign insurers doing business in Nebraska. He says that under such circumstances,

the policy issued is void. His position is inconsistent as he is seeking to recover under the same policy he asserts is void. Defendant Quattrocchi is estopped to assert the invalidity of the very contract upon which he seeks to recover. "A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party." Chicago, B. & Q. R.R. Co. v. State Board of Equalization & Assessment, 170 Neb. 77, 101 N. W. 2d 856. See, also, Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N. W. 2d 416.

Is defendant Quattrocchi, under the existing circumstances, insured as to the Hollamon claim? Plaintiff's policy insures Eagle Raceway, Inc., against damages for personal injuries and destruction of property caused by accident or arising out of the ownership, maintenance, or use of its premises for automobile racing events. It specifically excludes liability to *all participants* and to *all persons in the pit area.* In Endorsement No. 1, it is extended to cover liability of the *assured* for bodily injuries of *participants* provided that the participant executes a Waiver of Liability and Indemnity Agreement and, provided further, assured obtains personal accident insurance for all participants. This endorsement does not purport to insure one participant against damages for injuries sustained by another participant as is the case here. It simply protects Eagle Raceways, Inc., against claims by participants.

Endorsement No. 2 provides the coverage shall be: "* * * extended to include as additional assureds the Car Owners, Drivers, Sponsors and those officials employed by the Named Assured." This extension of coverage remains subject to the exclusions contained in the original policy. These provisions exclude liability *to* participants, to persons in the pit area during racing programs, and to persons on the track or racing surface. The endorsement is designed to protect participants

against claims made against them by persons who are not participants. In this connection, "participant" is defined as: "* * * any person granted permission for any purpose whatever by the Assured to enter the Restricted Area upon signing a Release and Waiver of Liability and Indemnity Agreement." "Restricted Area" is defined as: "* * * the area to which admission by the general public is prohibited, including but not limited to the pit areas, racing surface and infield, including walkways, concessions and other appurtenances thereon."

"A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning." Garrelts v. Department of Motor Vehicles, 176 Neb. 220, 125 N. W. 2d 678. We believe the meaning of the policy is clear and that plaintiff has no liability to the defendant Quattrocchi thereunder.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JACK SMITH, APPELLANT.
192 N. W. 2d 158
Filed December 3, 1971. No. 37999.

1. **Criminal Law: Entrapment.** Where a person has no previous intent or no previous purpose to violate the law but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction.
2. ———: ———. On the other hand, where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

S. J. Albracht, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Jack Smith, was convicted of having a narcotic drug, cannabis, in his possession with the intent to sell and distribute it. He alleges three assignments of error: (1) The failure of the State to prove its case; (2) the failure of the court to instruct the jury that the police officers must have had reasonable cause to believe he was predisposed to commit the act to legally entrap him; and (3) the failure of the court to admonish the jury that his acts of January 16, 1970, could not be considered as "prior conduct." We affirm.

Defendant, who had a previous felony conviction, testified in his own defense. He testified that he was entrapped by the sheriff. His partner, Daugherty, secreted marijuana in his filing cabinet as well as in the basement of his home which Daugherty used to store ceramics. Defendant adduced evidence that Yanovich, an associate of Daugherty, was an informer and tried to sell information to the Papillion police and to the federal authorities. He admitted that on January 16, 1970, at the request of Yanovich, he delivered a sealed package from a filing cabinet in his office to Yanovich at the Papillion airport. Yanovich on that occasion was sitting in the car with another individual later identified as Jerry Hannon. Defendant handed the package to Hannon and received nothing for it. He did not know what was in the package until the next day when Yanovich told him that it contained marijuana, and that Daugherty had marijuana stored in the defendant's

basement. Defendant then testified that he attempted to contact Daugherty and it was not until a couple of days later that he saw Daugherty and demanded that he remove the marijuana from his basement.

On the 20th of January defendant received a telephone call from someone wanting to get in touch with Yanovich. This individual identified himself as the one who had been with Yanovich at the airport, so defendant gave him Daugherty's telephone number. About 2 or 3 hours later, Daugherty and Yanovich came to his home. They had two bags with them. They wanted defendant to deliver one of the bags to Tara Plaza and leave the other in his shop, and they offered him $100 to deliver the bag to an individual at Tara Plaza. Defendant agreed to do so. He parked his car alongside the only one parked at the Tara Plaza and walked over to that car, which corresponded to the description given him. He recognized the individual in the car as the one who had been with Yanovich the evening of January 16th. Defendant delivered the package and received five $20 bills. Deputy sheriff Barrett then popped out of the trunk of the car and defendant was arrested.

The evidence of Jerry Hannon, who was an undercover agent for the sheriff, is in direct conflict with that of the defendant. It is Hannon's testimony that on the evening of January 16 he gave the defendant $100 supplied by the sheriff for the package he delivered, and asked him if he could get more, and the defendant replied: "'Yeah.'" Hannon further testified that he called the defendant on the 20th and set up a buy. The testimony is as follows: "I said, 'This is Jerry and I would like to buy a pound.' And he said, 'I don't know if I can get to you.' He said it wouldn't be until about 8:30 that he could make it. And I told him I was at the Cabay Lounge; how about meeting me there at the lot? 'I'll meet you at 8:30.'" Hannon then notified the sheriff, carrying the marked money in his billfold

to make the buy, and went to the agreed location with deputy sheriff Barrett who hid in the trunk of the car. Hannon further testified: "I motioned for him to come over to my car; and he came over and got in. And I saw that he had more than a pound of marijuana. And I said, 'I ain't got enough to buy that, Jack. All I've got is a hundred dollars.' He said, 'I didn't have time to cut it down. I'll do you a favor, and you take it.' I gave him the money; and he put it in his billfold. And he said, 'I'll see you later.' And Mike jumped out of the trunk and arrested him."

Facts constituting entrapment, which is in the nature of an affirmative defense, are ordinarily to be determined by the jury or the trier of fact in each individual case, and its findings will be disturbed only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. State v. Ransburg, 181 Neb. 352, 148 N. W. 2d 324.

In the Ransburg case, we followed the majority holding in Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249, and held that where a person has no previous intent or no previous purpose to violate the law but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction. On the other hand, where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense.

The mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment. There was a serious conflict in the evidence and the issue became one of credibility for the jury.

On the record, the jury could readily find there was no enticement herein; that the State did no more than present an opportunity which the defendant accepted.

We have reviewed the instructions of the court and find that they are proper under the evidence adduced herein. The court fully instructed on defendant's defense and put the burden on the State to prove beyond a reasonable doubt that defendant was not improperly induced to commit any unlawful conduct.

We find the evidence sufficient to sustain the conviction and affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE J. ORTIZ, APPELLANT.
192 N. W. 2d 151

Filed December 3, 1971. No. 38022.

1. **Criminal Law: Evidence.** In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged.
2. **Criminal Law: Evidence: Jury.** It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
3. **Criminal Law: Evidence.** A person of sound mind is conclusively presumed to intend the obvious and probable consequences of his voluntary act.
4. ———: ———. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is ordinarily proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Jeffrey L. Orr and Richard J. Bruckner, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

The defendant, Lawrence J. Ortiz, appeals from a conviction of murder in the first degree. He challenges the sufficiency of the evidence to sustain the conviction and asserts there was error in the admission of evidence and in a denial of the right to introduce surrebuttal testimony. We affirm the judgment of the district court.

The defendant and one Charolette Elaine Whittington had traveled to Ohio and then back to Omaha, Nebraska, together. On the evening of Friday, August 28, 1970, they drove to Lincoln, Nebraska, and registered together in a motel. On the next evening, Saturday, they were out eating and drinking until about 1:30 a.m. Sunday morning. The defendant registered alone at a motel in Kearney, Nebraska, at about 9:30 a.m. on Sunday, August 30, 1970. He remained at least until evening but was gone at 7 a.m. Monday morning and in the early afternoon of Monday, August 31, 1970, sold his automobile to a Lincoln used-car dealer. He was taken by taxicab from a Lincoln hotel, together with his luggage, to a bus station that same afternoon and told the driver he was in a hurry to catch the bus. His automobile was subsequently found to have human blood spots on the rear floor mat and on the chrome strip under the right door.

On the afternoon of Monday, August 31, 1970, a grass or brush fire occurred in an area adjacent to the Platte River approximately 15 miles west of Kearney, 3 miles south and 1¼ miles east of Elm Creek, Nebraska. The body of Charolette Elaine Whittington was found on the edge of the burned patch. The clothing was pushed up

under the armpits and there were marks indicating it had been dragged from a lane referred to as a river trail.

The autopsy revealed that Charolette had been badly beaten around the face and head with several teeth being knocked out and her hands had been severed. These do not appear to have been found. The body was burned in certain areas and was practically bloodless. The doctor testified that the only blood he obtained, about a tablespoonful, had to be obtained directly from the heart. He further stated that after death occurs, there would be little bleeding, only a little seepage, that there were no major lacerations of the scalp, and death was unlikely to occur from bleeding at the lips which revealed the worst lacerations. The only large lacerations found resulted from the cutting off of the hands. Death resulted from trauma and he could not fix the time of death but said she may have been dead a day or two. Examination of the blood revealed very small quantities of alcohol and barbiturates. Not enough to cause death.

After defendant's arrest, while being fingerprinted by a deputy sheriff, he informed the deputy "that he and this other woman had an argument after a dinner," that she borrowed his car to get "a fix," and he went to sleep. The next morning his car was back at the motel, but she did not appear. He saw blood in the car and got scared but did not notify the police.

Defendant's evidence indicates Charolette was a narcotic addict, an informer who was in trouble with unspecified black people in Omaha, and afraid of reprisals. His own testimony indicates that on the return trip to the motel early Sunday morning, she called someone about getting "a fix"; two men called at the motel for her and she left with them, taking defendant's car; he arose about 8 a.m. that morning, found the car, but did not find Charolette, called her cousin in Omaha to learn if she were there and on being told she was not, thought she may have gone to Grand Island or Kearney as they

had been talking of visiting relatives of hers in that area. He did not know where the relatives lived, but drove to Grand Island, looked in the bars, and then went on to Kearney. Not finding her, he returned to Lincoln where he claims to have stayed for 4 days. Then on reading about Charolette's death, he became frightened, knowing of his own past record, and went to Wichita, Oklahoma City, Albuquerque, and Texas before returning to Omaha.

The evidence is circumstantial for the most part, but we believe it is sufficient to sustain the verdict. The evidence of the State indicates defendant was the last person to see Charolette alive. He was in the general vicinity of the place where the body was found as early as 9:30 a.m. on that Sunday morning, when her death had to have occurred, and there were human bloodstains in his automobile. Fibers similar in color and texture to those used in the rear floor mat of defendant's car were found on Charolette's clothing. In addition, he had volunteered to a deputy sheriff that: "* * * he and this other woman had an argument after a dinner." He failed to notify the police when she disappeared and fled to the southwest after disposing of the bloodstained car. The defendant's story of Charolette's leaving with strangers is completely uncorroborated. Had the strangers killed her, they would have had to transport her body to the spot where it was found. His own account of his actions is not conducive to belief. He told the deputy sheriff that he saw bloodstains in the car on Sunday morning, but omits this in his testimony. If he found bloodstains, he must have suspected something had happened to her. Notwithstanding, he failed to notify the police and instead now says he thought Charolette had gone to visit relatives in the area where her body was found. This conflicts with his theory that she was killed by the two strangers. He fails to explain how he expected her to get there or why she should leave without his knowledge. Also, he claims not to have left Lincoln until after 8 a.m. and to have looked through

the Grand Island bars on his way to Kearney yet he was in Kearney at about 9:30 a.m., checked into a motel, and, according to his statement, left the same day.

"In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged. * * *

"It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed." State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265. We find that the evidence fails to reflect any reasonable hypothesis of innocence but on the contrary, sustains a rational theory of guilt.

Defendant contends that the essential elements of premeditation, deliberation, malice, and purpose or intent to kill have not been proved. These elements are mental processes which are conceived and hidden in the mind. They are rarely susceptible of proof by direct evidence but must be ascertained by reference to such outward manifestations as the acts of the person concerned and from all the facts and circumstances. In the present instance, the jury could reasonably find that Charolette bled to death from the severance of her hands. The undisputed medical evidence indicates that her body was drained of blood which could only have occurred while her heart was still beating and that her other injuries could not have resulted in such extensive bleeding. They could also find that defendant was aware, as a matter of common knowledge, that bleeding and death would ensue from such injuries. The severing of the hands was of necessity a deliberate and premeditated act and when performed while Charolette was still

alive, although probably unconscious, may well have been deemed by the jury as intended to bring about her death. If so, the elements of malice, intent to kill, deliberation, and premeditation were necessarily present. A person of sound mind is conclusively presumed to intend the obvious and probable consequences of his voluntary act. See, Baskins v. State, 138 Neb. 334, 293 N. W. 270; Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560.

It is asserted that exhibits consisting of pictures taken of the body at the location and in the condition found were erroneously admitted because not competent and relevant. These pictures served to show the nature of the area where the body was found, the conditions resulting from the brush fire, the condition of the body, the nature of the injuries, and the arrangement of the clothing which indicated it had been dragged. The foundation evidence is unchallenged and this evidence was relevant and material. Two exhibits consisting of pictures of portions of the body taken after its removal are likewise criticized. These pictures were introduced to show certain peculiarities found on the body which facilitated identification. They too were relevant and material for the purpose used. "A photograph proved to be a true representation of the person, place, or thing which it purports to represent is ordinarily proper evidence of anything of which it is competent and relevant for a witness to give a verbal description." State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443. See, also, Davis v. State, 171 Neb. 333, 106 N. W. 2d 490.

The State produced one rebuttal witness, the taxicab driver who testified to taking defendant to the bus station. Defendant now asserts error on the ground he was denied the right to answer or rebut this testimony. At no time did defendant request this or indicate to the court that he desired to introduce evidence of this nature. The assignment is without merit.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. MOROSIN, APPELLANT.
192 N. W. 2d 165

Filed December 3, 1971. No. 38042.

Sentences: Appeal and Error: Statutes. Unless an abuse of discretion appears, we will not disturb a sentence within statutory limits.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

An information charged that defendant knowingly had concealed a stolen motorcycle with the intent to defraud the owner. Upon a plea of guilty the district court sentenced him to imprisonment for 2 to 3 years. On appeal defendant complains that the sentence was excessive. The governing statute, section 28-522, R. R. S. 1943, prescribed imprisonment for not less than 1 year nor more than 10 years.

We may reduce a sentence when in our opinion it is excessive, and we are under a duty to render such sentence as the evidence may warrant. See § 29-2308, R. R. S. 1943. Unless an abuse of discretion appears, we will not disturb a sentence within statutory limits. See State v. Escamilla, *ante* p. 457, 191 N. W. 2d 548 (1971).

The record persuades us not to reduce the sentence. The judgment is affirmed.

AFFIRMED.

THOMAS J. WINSTON, APPELLEE, V. CLOIS WAYMAN DAVIS, JR., AND CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANTS, METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, INTERVENER-APPELLEE.

192 N. W. 2d 413

Filed December 10, 1971. No. 37901.

1. **Verdict: Jury: Evidence: Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate it was the result of passion, prejudice, or mistake, or it is clear that the jury disregarded the evidence or controlling rules of law.
2. **New Trial: Jury: Evidence: Appeal and Error.** When a new trial is sought on the ground of misconduct by the jury, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.
3. **New Trial: Motions, Rules, and Orders: Jury: Appeal and Error: Trial.** Where a motion for a new trial presents a question of fact concerning the regularity of the jury's deliberations, the trial court becomes the trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong.
4. **Automobiles: Statutes: Negligence.** A statute granting the right-of-way to the driver of an emergency vehicle, over other drivers using the highway, does not relieve him from the responsibility of driving with due regard for the safety of all persons on the highway, and does not protect him from the consequences of arbitrarily exercising such right-of-way.
5. ———: ———: ———: The driver of a vehicle upon a highway shall yield the right-of-way to law enforcement vehicles when operated on official business and the driver thereof sounds audible signal by bell, siren, or exhaust whistle. This provision shall not operate to relieve the driver of a law enforcement vehicle from the duty to drive with due regard for the safety of all persons using the highway nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of such right-of-way.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Herbert M. Fitle, James E. Fellows, and George S. Selders, Jr., for appellants.

S. J. Albracht and Michael P. Cavel of Lathrop, Albracht & Dolan, for appellee.

Cecil S. Brubaker, for intervener-appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

In this intersection automobile accident a police cruiser car of the defendant City of Omaha, while chasing a speeder known to be living in the vicinity, went through a stop sign and collided in an intersection with the plaintiff's motorcycle. From a jury verdict and judgment of $18,601, the defendant City of Omaha appeals claiming excessiveness in the verdict, misconduct of the jury in its deliberations, and error in the instructions.

Plaintiff sustained four fractured front teeth, cuts in his lower lip, one of which went completely through the skin, facial abrasions, an inch-long deep laceration of the tongue, and abrasions of his chest, shoulder, and back. The evidence as to his out-of-pocket expense and loss of earnings and medical, dental, and hospital expense sustains a finding of $3,601. The evidence shows a 10-day period of hospitalization and will sustain a finding that the plaintiff's speech has been impeded as the result of the deep scarring of his tongue and that he has permanent facial scars which will continue to be a source of embarrassment to him. The city's attempt to color match the cases of O'Brien v. J. I. Case Co., 140 Neb. 847, 2 N. W. 2d 107; James v. Hayden Bros., 97 Neb. 619, 150 N. W. 1013, and other cases is inapposite. The area of pecuniary allowances for pain and suffering is a highly subjective area. We find no analogy in the older cases.

Modern conditions allow a permissible different response to facial scars and disfigurement. Also, the impact of inflationary conditions renders the color of past decisions to this area less visible. In this case, inflationary considerations alone destroy the invitation to exercise the righteously passionate judicial response demanded as a requirement for setting aside a jury verdict. See, Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186; Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. We find no merit to this contention.

The city's attack upon the misconduct of the jury is two pronged. The first is an assertion of a coercively compelled verdict. This claim rests upon the hearsay testimony of two jurors concerning a speculative communication from the bailiff to the foreman or from the foreman alone allegedly used as pressure against three of the dissenting jurors, after 2 days of deliberation with the vote standing 8 to 4 or 9 to 3 in favor of the plaintiff. We need not explore any of the refinements of the historic reluctance of courts to invade from hindsight the absolute independence and integrity of jury deliberations. The hearsay testimony of the two jurors is directly refuted and denied by the bailiff and the foreman whose version was undoubtedly accepted by the trial judge in exercising his discretion in refusing to grant a new trial. The evidence of misconduct of the jury must be clear and convincing and the lower court's decision as to disputed facts and reference thereto will not be disturbed on appeal unless clearly wrong or constituting an abuse of discretion on the trial court's part. Haarberg v. Schneider, 174 Neb. 334, 117 N. W. 2d 796. There is no merit to this contention.

The other challenge is based upon a controversy arising in the heated discussion of taking the final votes in arriving at the 10 to 2 verdict in the case. It appears that the votes for the plaintiff in the 2 days of deliberation had increased from a majority of 8 to 4 to 9 to 3. The

most that we can gather from the rather vague testimony in this area is that the three dissenting jurors agreed that one of them would go over to the majority. This is not an agreement in advance to abide by a majority vote when and if taken. It is not a compromise verdict in the sense of a quotient verdict (agreeing in advance to an averaging of amounts). On the contrary once the continued and increasing majority was known to the jurors, the response in the case at bar was nothing more than the typical and legitimate pressure of a majority view upon the minority jurors. After continuous discussion the three dissenting jurors in the case at bar agreed that one of them would go over to the majority in order to reach a final verdict. We see no misconduct of the jury in this situation. Fortunately, this very distinction in an almost identical situation was passed on in Boddeker v. Olschewske, 127 Tex. 598, 94 S. W. 2d 730. The court in that case stated as follows: "The agreement * * * condemned was one made in advance when it was not known how the majority would vote. An agreement made after it became known on which side the majority had voted, the effect of which was that the minority would defer to the majority and make the vote unanimous, does not constitute misconduct." We find no merit to this contention.

A city policeman, driving a cruiser car, was chasing a known speeder who lived in the vicinity where the accident occurred. The evidence shows that he was traveling at a speed beyond the speed limit and went through a stop sign immediately prior to the time of the intersection accident involved in this case. The duties and responsibilities of a driver of an emergency vehicle are the critical issues in this case. The trial court fully instructed upon all of the applicable statutes to this situation. Then in instruction No. 15, following NJI No. 7.04, the trial court gave the following instruction: "Ordinarily, the driver of a vehicle about to enter a highway protected by a stop sign must stop his vehicle,

look for approaching traffic on the protected highway, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent or obviously dangerous for him to proceed into the intersection. If there is a vehicle approaching on the protected highway, the vehicle entering such highway must wait until the approaching vehicle has passed, unless a prudent person would have reasonable ground to believe that such vehicle is so far distant from the intersection and traveling at such a speed that he could safely enter in advance thereof.

"The duty, in such a situation, of the driver of a law enforcement vehicle, either to stop, or slow, or yield the right-of-way, as well as the duty of the driver of a vehicle on the protected street, depend upon all the circumstances, and your judgment upon those issues, as well as upon all the issues in this case, must be based upon all the circumstances as shown by the evidence."

It is asserted in the argument that the district court's instruction No. 15 failed to advise the jury of the rights of a driver of an emergency vehicle and advised it that the driver of a police department vehicle on official business, and sounding an audible signal by siren, should have the right-of-way and the drivers of other vehicles shall yield such right-of-way to such police department vehicle. It is difficult to follow the argument of the city in this respect. The trial court properly stated all of the applicable statutes and the governing case law. Hammon v. Pedigo, 173 Neb. 787, 115 N. W. 2d 222. It is obvious from reading instruction No. 15 along with instruction No. 13 that the trial court gave an appropriately comprehensive instruction which properly directed the jury to balance the acts of the driver of the emergency vehicle depending on all of the circumstances in the case. Far from error the instruction as applied to the case is a model of balance and clarity. Without detailed recital, a very pertinent part of the surrounding circumstances brought to the jury's attention in this case,

without objection, involved the fact that the driver of the police cruiser was acquainted with the speeder he was chasing, his identity was known to the policeman who was familiar with where he lived and was following him in the vicinity of his residence. In this context, the applicability of the instructions given by the trial court is obvious. There is no merit to this contention.

The assignments of error may not be sustained. The verdict and judgment of the district court are free from error and are affirmed.

AFFIRMED.

NEWTON, J., dissenting.

The statutes of Nebraska mentioned in the majority opinion render inapplicable to police vehicles engaged in the pursuit or apprehension of law violators the ordinary statutory rules regarding speed limits, stop signs, and right-of-way. Under such circumstances, the disregard or violation of such rules *cannot be considered evidence of negligence,* yet the court so instructed in instructions Nos. 12 and 15.

These ordinary traffic rules are completely irrelevant in cases such as this. The police vehicle, sounding its siren, may travel at any speed necessary, may disregard stop signs, and its driver may rely on his right to have the right-of-way, subject only to the provision that it be operated with due regard for the safety of others.

The sole issue in this case is whether or not the police vehicle was operated with due regard for the safety of others upon the highway. This proposition must be determined in the light of what a person of ordinary prudence would or would not have done under the same circumstances. It ordinarily presents an issue for the determination of the jury, but it is error to cloud the issue with an instruction that a violation of the inapplicable statutory rules of the road may be considered as evidence of negligence.

A high speed chase through city streets is always a hazardous project and the same rule of law should be

applied as is used in other types of cases. The police are entitled to assume that their right-of-way will be respected unless and until they have knowledge to the contrary.

The rules adopted in the majority opinion have the effect of making the drivers of emergency vehicles insurers of all other travelers on the highway. The instructions given and approved establish the rule that such drivers may be considered negligent *solely* because they exceed the speed limit, run a stop sign or red light, or avail themselves of their statutory right-of-way. It is tantamount to saying that under such circumstances the driver of an emergency vehicle *may always be found to be negligent.*

In my judgment, the judgment in this case should be reversed and the cause remanded for a new trial under proper instructions.

BOSLAUGH, J., joins in this dissent.

SPENCER, J., dissenting.

I agree fully with the dissent of Newton, J., but I also believe that there is an even more basic reason why the judgment herein cannot stand, and a new trial must be granted.

The majority handles the misconduct of jury issue in a very summary manner. Three of the jurors, after continuous discussion, could not agree with the majority vote. They were informed by the foreman, supposedly because he was so told by the bailiff, that the jury must arrive at a verdict. The three of them were unwilling to change their vote but because they had been told there could not be a hung jury, they agreed that they would draw straws and the loser would be required to change his vote even though he was not in agreement with the verdict. I cannot see how this can be other than a coerced verdict.

The law is very clear that any method of arriving at a verdict except through the exercise of judgment after weighing the evidence is improper. This cer-

tainly would preclude the method employed here of agreement to join in a verdict regardless of the juror's individual judgment. See, 89 C. J. S., Trial, § 472, p. 111; 53 Am. Jur., Trial, § 1079, p. 710; Annotation, 73 A. L. R. 93.

The majority opinion has the following language: "Fortunately, this very distinction in an almost identical situation was passed on in Boddeker v. Olschewske, 127 Tex. 598, 94 S. W. 2d 730." Unfortunately for the majority, the Boddeker case did not involve chance or a lottery as this one does. In a subsequent case, Kindy v. Willingham, 146 Tex. 548, 209 S. W. 2d 585 (1947), the Texas court held: "A verdict should not be the result of chance or lot but should be arrived at through the deliberate judgment, sound reflection and conscientious conviction of the jury."

Every verdict should be arrived at through deliberate judgment, sound reflection, and the conscientious conviction of the jury, and should never be the result of chance or lot. This case is not too different from the quotient verdict cases heretofore before this court. In Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516 (1951), this court held that if there is an agreement to be bound and the jurors vote accordingly, then the court must grant a new trial. As the court said, the vice of such a verdict is that it does not represent the deliberate judgment of the jurors and it is subject to manipulation and partakes of the nature of a lottery. See, also, Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757 (1931); Schrage v. Miller, 123 Neb. 266, 242 N. W. 649 (1932).

The following language quoted from Cooley, J., at 46 Mich. 628, in Gillaspie v. Nebraska Tractor & Equipment Co., 175 Neb. 401, 122 N. W. 2d 17, is very pertinent herein: " ' "The law contemplates that they (the jury) shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring

jury trial into discredit and to convert it into a lottery." See also Meyer v. Shamp, 51 Neb. 424, 430.' "

IN RE APPLICATION OF LANETA M. ABLER.
LANETA M. ABLER, APPELLEE, V. HERMAN BROS., INC., ET AL., APPELLANTS.
192 N. W. 2d 410

Filed December 10, 1971. No. 37949.

1. **Carriers: Public Service Commissions: Trial.** In a stock transfer proceeding under the Motor Carrier Act, the personal appearance of the applicant at the hearing is not necessarily a condition precedent to approval of the proposed transfer by the Nebraska State Railway Commission.
2. ———: ———: ———. Subject to the Motor Carrier Act, determination of the factors relevant to the public interest in a stock transfer proceeding is left primarily to the Nebraska State Railway Commission.
3. **Carriers: Public Service Commissions: Trial: Evidence.** In a stock transfer proceeding under the Motor Carrier Act, the Nebraska State Railway Commission in weighing the public interest possesses a discretion to decide whether evidence of an allied employment and noncompetition agreement is necessary.
4. **Appeal and Error: Public Service Commissions: Administrative Law.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission within commission jurisdiction, questions for determination are sufficiency of the evidence to support the findings, adequacy of the findings and conclusions to support the order, and the reasonableness or arbitrariness of the order.

Appeal from the Nebraska State Railway Commission. Affirmed.

James E. Ryan and Viren, Epstein & Leahy, for appellants.

Duane W. Acklie, Gailyn L. Larsen, and Acklie & Peterson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The Nebraska State Railway Commission approved an agreement for purchase of all issued and outstanding shares of capital stock in Canada Transport, Inc., a common carrier. Protestants appeal. They assert insufficiency of the evidence and arbitrariness of the approval order.

The application by the purchaser, LeNeta Abler, was also signed by her husband, Paul Abler, who was doing business as Central Transport Co. Central Transport, a common carrier, held authority in part to transport bulk products to destinations located in ten counties of Nebraska.

Testimony of Paul Abler is as follows. Central Transport and Canada were competing to some extent. Upon approval and transfer of the shares he would manage Canada, relinquishing a successful management of Central Transport to his assistant. The two companies would operate separately for family and financial reasons.

LaNeta Abler, who inferably was not knowledgeable in transportation business, neither testified nor personally appeared.

The record includes evidence of equipment of both companies, abstracts of shipments transported by Canada, the stock transfer agreement, and testimony to the financial position of LaNeta and to provisions for employees of Canada.

Testimony of Earl Canada, the proposed seller and sole stockholder of Canada, is as follows. He and LaNeta agreed in writing to noncompetition by him and to her employment of him in an advisory capacity for 15 years. The consideration was payable monthly. He did not recall the consideration, having left the agreement at his office in Lexington. This allied agreement was not offered in evidence.

Approval by the commission of an application for stock transfer under the Motor Carrier Act must rest

upon findings that: (1) The transaction will be consistent with the public interest; (2) it will not unduly restrict competition; and (3) the applicant is fit, willing, and able to perform the proposed service properly. § 75-320, R. R. S. 1943.

Protestants argue that LaNeta's absence constituted a failure of evidence of her fitness, willingness, and ability. The argument is not well taken. The personal appearance of the applicant at the hearing is not necessarily a condition precedent to the commission's approving the proposed transfer. Cf. Bridgeways, Inc. - Purchase - Consolidated Freight Co., 50 M.C.C. 175, 180 (1947). Paul Abler, the man with the requisite knowledge and experience, testified to her fitness, willingness, and ability. The testimony under the circumstances was sufficient.

Protestants argue that nonproduction of the allied agreement rendered the evidence insufficient to meet the remaining statutory requirements.

Subject to the Motor Carrier Act, determination of the factors relevant to the public interest in a stock transfer proceeding is left primarily to the commission. Courts generally have not explicated prohibitions against undue restriction of competition among carriers. Cf. Jeffries-Eaves, Inc. v. Gettel, Inc., 173 Neb. 337, 113 N. W. 2d 476 (1962); United States v. I.C.C., 396 U. S. 491, 90 S. Ct. 708, 24 L. Ed. 2d 700 (1970); Trieneus, "The Role of Competition in Transportation and Communications." 39 A.B.A. Antitrust L. J. 470 (1970-71).

No one denied protestants the right to inspect or offer the allied agreement in evidence. Their argument, for which they cite The Pittson Co. - Control - Brink's Inc., 75 I.C.C. (Fin. Rep.) 345 (1958), 80 I.C.C. (Fin. Rep.) 179 (1959). That Canada's testimony without the allied agreement constituted insufficient evidence might prevail elsewhere. See, Youngstown Cartage Co. - Control and Merger, 93 M.C.C. 318 (1963); McAllister Bros., Inc. - Control and Merger, 317 I.C.C. 459 (1962);

Ephraim, "Purchase Price Issues in Motor Carrier Section 5 Proceedings," Transportation Law Institute: Finance, Transfer and Security Cases 177, 188-189 (1969). The railway commission and this court may properly consider rulings by the Interstate Commerce Commission. Preisendorf Transport, Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865 (1960).

We decline to adopt the federal rules asserted by protestants. Some de-regulation may also be in the public interest. The railway commission in weighing the public interest possesses a discretion to decide whether evidence of an allied employment and noncompetition agreement is necessary. In the present case there was no abuse of discretion.

On appeal to the Supreme Court from an order of the Nebraska State Railway Commission within commission jurisdiction, questions for determination are sufficiency of the evidence to support the findings, adequacy of the findings and conclusions to support the order, and the reasonableness or arbitrariness of the order. Andrews Van Lines, Inc. v. Smith, 187 Neb. 533, 192 N. W. 2d 406.

Applying the foregoing rule, we affirm the order.

AFFIRMED.

IN RE APPLICATION OF MADELINE M. SMITH, DOING BUSINESS AS SMITTY'S VAN & STORAGE, OMAHA, NEBRASKA. ANDREWS VAN LINES, INC., APPELLANT, IMPLEADED WITH ACE MOVING & STORAGE CO., INC., ET AL., APPELLEES, V. CHARLES O. SMITH, DOING BUSINESS AS SMITTY'S VAN & STORAGE, OMAHA, NEBRASKA, APPELLEE.

192 N. W. 2d 406

Filed December 10, 1971. No. 37954.

1. **Public Service Commissions: Administrative Law: Motions, Rules, and Orders.** The Nebraska State Railway Commission has jurisdiction to reconsider and vacate an order on its own

motion within 30 days after the mailing of a copy of the order and before an appeal has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected, the power of the commission to reconsider an order on its own motion terminates.

2. **Case Overruled.** Strasheim v. Martin, 169 Neb. 787, 101 N. W. 2d 161, overruled, in part.
3. **Public Service Commissions: Administrative Law: Motions, Rules, and Orders.** A transfer of operating rights may be approved after notice and hearing if the Nebraska State Railway Commission finds that the transaction will be consistent with the public interest, does not unduly restrict competition, and the applicant is fit, willing, and able to perform the service.
4. ———: ———: ———. An order of the Nebraska State Railway Commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal.
5. **Public Service Commissions: Administrative Law.** The determination of what is consistent with the public interest is peculiarly for the determination of the Nebraska State Railway Commission.
6. **Public Service Commissions: Administrative Law: Evidence.** Evidence which would require a finding that a certificate authorizing the transportation of general commodities was dormant in part may not require a similar finding as to such certificate authorizing the transportation of household goods because of the differences between the two operations.

Appeal from the Nebraska State Railway Commission. Reversed.

Nelson, Harding, Marchetti, Leonard & Tate and Earl H. Scudder, for appellant.

Viren, Epstein & Leahy, for appellee Smith.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

BOSLAUGH, J.

This is an appeal from a proceeding before the Nebraska State Railway Commission upon the application of Madeline M. Smith for authority to acquire the operating rights held by her husband, Charles O. Smith, who died on January 16, 1968. Charles O. Smith held a certificate of public convenience and necessity which

authorized the transportation of household goods and office furniture between all points and places in Nebraska over irregular routes. The business operated as Smitty's Van & Storage.

Protests were filed by eight other carriers and a complaint was filed by five carriers alleging that the certificate sought to be transferred was dormant. On June 16, 1969, the commission found that a limited operation had been conducted, that the authority should be restricted to points within a 250-mile radius of Omaha, Nebraska, and that all shipments must originate or terminate within a 60-mile radius of Omaha. The commission authorized the transfer of the authority as modified, and also authorized the lease of the certificate as requested by the applicant. The order was mailed June 23, 1969.

A motion for rehearing was filed by the applicant on June 27, 1969, and a supplemental motion for reconsideration was filed on December 4, 1969. On March 20, 1970, the motion for rehearing was overruled.

On April 13, 1970, the commission, on its own motion, reconsidered its order of March 20, 1970, and vacated and set it aside. On April 27, 1970, the commission authorized the transfer of the authority to the applicant without restriction. It is from this order that the protestant, Andrews Van Lines, Inc., appeals.

The protestant contends that the commission had no jurisdiction on April 13, 1970, to reconsider on its own motion its order of March 20, 1970, and that the order of April 13, 1970, vacating and setting aside the order of March 20, 1970, is void.

The protestant relies upon Strasheim v. Martin, 169 Neb. 787, 101 N. W. 2d 161, which held that the commission lost jurisdiction when it overruled a motion for rehearing in a proceeding upon an application for a certificate of public convenience and necessity. In the Strasheim case the commission had granted the application. Then, on the same day, the commission overruled

the motion for rehearing; reconsidered its previous order granting the application; and then denied the application. Upon appeal this court held that the commission lost jurisdiction of the proceeding when it overruled the protestant's motion for rehearing.

The applicant contends that the time for appeal from the order of March 20, 1970, did not begin to run until March 31, 1970, the date on which a copy of the order was mailed; and that until an appeal was perfected, the commission had control of its order and could vacate and set it aside. We have reconsidered our holding in the Strasheim case and have reached the conclusion that it is too restrictive.

The commission is a constitutionally created body that exercises judicial powers. This distinguishes it in certain respects from other agencies which exercise purely administrative powers. Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N. W. 2d 922. The power to decide usually implies the power to reconsider. Albertson v. Federal Communications Comm., 182 F. 2d 397. The Legislature has recognized the power of the commission to reconsider an order upon the motion of a party. § 75-137, R. S. Supp., 1969. We think a similar power exists upon the motion of the commission itself. Such a power ordinarily expires at the end of the time within which an appeal may be taken. Anchor Casualty Co. v. Bongards Co-operative Creamery Assoc., 253 Minn. 101, 91 N. W. 2d 122, 73 A. L. R. 2d 933.

Section 75-137, R. S. Supp., 1969, provides that an appeal to this court may be taken within 30 days after the mailing of a copy of the order. An appeal is deemed perfected and this court has jurisdiction of the cause when a notice of appeal has been filed and the docket fee paid as required by law. We hold that the commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to this court has been taken. Upon the

expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to this court, the power of the commission to reconsider its order upon its own motion terminates.

In this case the order of March 20, 1970, which was mailed to the parties on March 31, 1970, was vacated and set aside by the commission on April 13, 1970. No appeal had been perfected and the 30-day period commencing March 31, 1970, had not expired. The order of April 13, 1970, was, therefore, within the jurisdiction and power of the commission.

The other assignments of error relate to the finding of the commission that the application for transfer of the operating rights should be granted without restriction. Section 75-318, R. S. Supp., 1969, provides that the commission may authorize a transfer of operating rights if, after notice and hearing, "* * * the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service * * *."

Section 75-134, R. S. Supp., 1969, requires that an order of the commission, entered after a hearing, contain a discussion of the basic facts, the ultimate facts, and the commission's reasoning or other authority. An order of the commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal. Basin Truck Co. v. All Class I Rail Carriers, 172 Neb. 28, 108 N. W. 2d 388. In the order of April 27, 1970, the commission made no finding other than that the application should be granted. The order is clearly irregular and must be set aside for this reason.

Section 75-321, R. R. S. 1943, which provides that the authority conferred by a certificate held by a deceased person shall continue temporarily with his legal representative is not applicable here. The order of April 27, 1970, authorizes a permanent transfer of the authority to the applicant.

The protestant further contends that the certificate involved in this case was dormant, at least in part, and that the transfer of the certificate would result in a new or different service or operation as to territorial scope, so that a transfer of the certificate could be approved only upon proof and a finding that the transfer is required by public convenience and necessity. § 75-318, R. S. Supp., 1969. In this regard the evidence showed that the operations under the certificate were not as extensive as those of some of the applicant's competitors, and that recent operations had been largely in Omaha and the surrounding area.

The certificate involved in this case authorized the transportation of household goods. In determining the issue of dormancy, consideration must be given to the differences between the transportation of household goods and the transportation of general commodities. This has been recognized by the Interstate Commerce Commission in a number of cases. In United States Van Lines, Inc. — Purchase — J. Norman Geipe Van Lines, Inc., 87 M.C.C. 467, 470, the commission stated: "The transportation of household goods is a highly specialized service involving the use of equipment, facilities, and specially trained employees not ordinarily used in general commodity transportation. Also, the service rendered is essentially a call and demand type of operation performed for individual shippers who may never again have need for the service. These factors have caused the rejection of the strict approach on the issue of dormancy, or limited or sporadic service involving transfer of such type of authority."

In Myers Transf. & Storage Co. — Purchase — Pioneer Storage Co., 85 M.C.C. 264, the commission said: "In a long line of cases, for example, Evanston Fireproof Whose. — Control — Allied Van Lines, 40 M.C.C. 577, 594 (1946), and Geitz Stor. & Moving Co., Inc. — Investigation of Control, 65 M.C.C. 257, 296 (1955), the specialized nature and problems of household-goods trans-

portation, applicable to large and small carriers thereof, have been discussed. Clearly, it has been recognized that the stricter approach justified for withholding approval of the proposed purchase of general-commodity, regular-route operating rights, would not be appropriate to household-goods proceedings."

The determination of what is consistent with the public interest is peculiarly for the determination of the commission. Upon the record presented the commission was not required to find that the certificate was dormant in part or that a new or different service or operation as to territorial scope would result from the transfer.

The order of the commission is reversed as irregular for failure to make adequate findings as required by law.

REVERSED.

GARY A. LUEDERS, APPELLANT, V. LEILANI LUEDERS, APPELLEE.

192 N. W. 2d 161

Filed December 10, 1971. No. 37981.

Divorce: Parent and Child: Appeal and Error. In a post-divorce custody proceeding a determination of what constitutes reasonable visitation rights, or periodic possession of the minor children, lies within the discretion of the trial court. On appeal we will not disturb the determination except to remedy abuse of discretion.

Appeal from the district court for Douglas County: PAUL A. GARROTTO, Judge. Affirmed.

Thomas P. Kelley, for appellant.

Burbridge & Burbridge, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

After a divorce decree the district court, retaining

custody of the four minor children, granted the mother, Leilani Lueders, possession that was periodic. The father, Gary, appeals. He contends that the grant was contrary to the best interests of the children.

The district court in rendering the divorce decree in January 1970, found that (1) Leilani by reasons of adultery and instability was unfit for child custody, and (2) Gary should receive possession of the children. It granted Leilani reasonable visitation.

The order granting Leilani periodic possession sustained part of a motion that she had filed approximately 8 months after rendition of the divorce decree. The periods were (1) every other weekend from Saturday afternoon to Sunday evening, (2) every Christmas Eve, and (3) Easter Sunday and Thanksgiving Day of alternate years to commence in 1971. No child support was allowed.

Prior to the marriage in 1963 of Gary and Leilani, ages 29 and 31 in 1970, Leilani had been married to Wayne Moore. Two children, ages 11 and 10 in 1970, were born to the Moore marriage. The California court decreeing divorce of the Moores, retained custody of the children. It also withheld possession of them from Leilani for 2 years or until the approach of her marriage to Gary. Gary subsequently adopted them.

The adultery was an isolated, short-lived affair, Leilani engaging in no other extramarital romance. She conceived a child out of wedlock in April 1969. The child, born December 25, was placed with an agency for adoption. The Lueders children knew nothing of the affair. Leilani in June informed Gary, who was undisputedly sterile at the time of conception.

A history of Leilani's health was elicited from nonmedical witnesses. During the Moore marriage Leilani had suffered a "nervous breakdown" which caused her to be confined in a sanitarium 6 months. In June 1969, several days after Gary learned of the adultery, and in the presence of the two younger children, Leilani in-

gested an overdose of drugs with the intent to commit suicide. The overdose caused her to be hospitalized for 6 weeks. Because of her illness a psychiatrist advised Gary to postpone commencement of the divorce suit. Another disorder, of which Leilani had been a victim at least since her marriage to Gary, was epilepsy. Seizures occurred biennially and infrequently on other occasions marked by intense excitement. Medication was administered. The Lueders children have been aware of the disorder.

From October 1969 to April 1970, Leilani lived and worked at the home of Nels and Helen Rydberg. Her chief duties were housekeeping and care of Nels, an invalid. To improve her formal education Leilani during this period attended college classes 5 nights a week. Helen, assistant manager of a life insurance company, had faith in Leilani. Helen called her an adopted daughter, and at times left her grandchild in Leilani's care.

At trial time Leilani lived alone in a house with living room, dining room, kitchen, two bedrooms, and full basement at 3867 Franklin Street in Omaha. She was unemployed, subsisting on unemployment benefits and her small savings. She had been gainfully employed at a furniture store and the office of another company. Her unemployment was hopefully temporary. Helen Rydberg offered to transport the Lueders' children from Gary's home in Millard. She had already done so. A consequence of the trial court's order would be attendance by the children at two Presbyterian churches.

In a post-divorce custody proceeding a determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within the discretion of the trial court. On appeal we will not disturb the determination except to remedy abuse of discretion. See, Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647 (1971); Fry v. Fry, 186 Neb. 521, 184 N. W. 2d 636 (1971).

The district court retaining custody of the Lueders'

children will facilitate judicial supervision and summary power to act swiftly in their best interests. See Hanson v. Hanson, *supra*. The order did not constitute abuse of discretion. It is affirmed. Leilani's request that she be allowed a sum for services of her counsel in this court is denied. See Wolpa v. Wolpa, 182 Neb. 178, 153 N. W. 2d 746 (1967).

AFFIRMED.

SAM R. CHUDOMELKA, APPELLANT, V. BOARD OF EQUALIZATION OF DODGE COUNTY, NEBRASKA, APPELLEE.
192 N. W. 2d 403

Filed December 10, 1971. No. 37987.

1. **Taxation: Property: Administrative Law: Appeal and Error.** Upon an appeal from a county board of equalization on the ground that property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property.
2. **Taxation: Property: Administrative Law: Statutes: Words and Phrases.** For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Actual value is to be determined by using the applicable elements including those specified in section 77-112, R. S. Supp., 1969.
3. **Taxation: Property: Witnesses: Evidence.** Either lay or expert witnesses may testify as to the value of property if it is shown that they have an acquaintance with the property and are informed as to the state of the market.
4. ———: ———: ———: ———. The competency of a witness to testify as to value is a matter within the discretion of the trial court.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Edward L. Robins, for appellant.

McGrath, North, Nelson, Shkolnick & Dwyer and John E. North, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The plaintiff, Sam R. Chudomelka, is the owner of three tracts of farmland in Dodge County, Nebraska. The land is level bottomland lying several miles north and northwest of Ames, Nebraska. In 1969, the actual value of this land for tax purposes was increased from $69,025 to $148,000. Apparently, this was pursuant to a countywide reappraisal by Justin H. Haynes & Company.

The plaintiff filed protests with the Board of Equalization for Dodge County which fixed the value of the three tracts at $147,525 exclusive of improvements. The plaintiff then appealed to the district court where the value was again fixed at $147,525. The plaintiff has now appealed to this court. There is no cross-appeal.

The plaintiff alleged that the valuation made by the board of equalization was excessive and confiscatory and that the valuation previously determined was the true value of the land. There is no issue concerning the value of the improvements.

The only issue before the district court was the actual value of the land. Lancaster County v. Brown, 76 Neb. 286, 107 N. W. 576. For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56. Actual value is to be determined by using the applicable elements including those specified in section 77-112, R. S. Supp., 1969.

The plaintiff testified in detail concerning each tract. His testimony indicated a combined value of from $78,000 to $84,000 for the three tracts. Charles M. Dake, a farmer who was familiar with the plaintiff's land, testified as to the value of two of the tracts. His testimony

placed their value at a slightly higher amount than that of the plaintiff.

The plaintiff offered the testimony of four other witnesses on the issue of value. All were lay witnesses who were familiar with the plaintiff's land. Objections as to foundation for the testimony of these witnesses were sustained. The record shows that each of these witnesses had little or no information as to market conditions.

Either lay or expert witnesses may testify as to the value of property if it is shown that they have an acquaintance with the property and are informed as to the state of the market. Lansman v. State, 177 Neb. 119, 128 N. W. 2d 569. The competency of a witness to testify as to value is a matter within the discretion of the trial court. Aurora Hotel, Inc. v. Board of Equalization, 140 Neb. 511, 300 N. W. 419. The record does not show an abuse of discretion in this case.

The defendant produced the testimony of Josef A. Jackson, an expert appraiser, who fixed the value of the land at $149,600. Jackson is employed as a farm loan supervisor by the Kansas City Life Insurance Company. He was previously employed by the Doane Agricultural Service and the Justin Haynes Company. He has had 14 years of experience in appraising farmland.

In arriving at his opinion, Jackson used both a market data approach and an income capitalization approach. In the market data approach he used six sales of similar land for comparison. He analyzed each transaction and explained in detail the similarities and differences between the tracts involved. In the income capitalization approach he used a combination of information obtained from the plaintiff, the ASC office, and standard analysis or assumed data to obtain an income figure. He then capitalized the owner's share at 5.5 percent to arrive at a valuation.

In a third approach, referred to as summation or cost, he classified the farmland in each tract and assigned a

value per acre determined from an analysis of market data.

The only sale referred to by the plaintiff was a sale of a 40-acre tract known as the Finnegan Estate in the fall of 1968. The Finnegan land was located directly east of the 80-acre tract owned by the plaintiff. Jackson was familiar with this sale but disregarded it because he considered it a forced sale and not a sale at arm's length.

The evidence is that the Finnegan land sold for $385 per acre at public auction. This compares with the plaintiff's testimony that the value of his 80-acre tract was around $200 or $225 per acre. It is apparent that the values suggested by the plaintiff were unrealistic. The record fully sustains the valuation made by the county board of equalization and the district court.

The judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS COUNTY BANK, A CORPORATION, APPELLANT, V. DEPARTMENT OF BANKING, STATE OF NEBRASKA, ET AL., APPELLEES.

192 N. W. 2d 401

Filed December 10, 1971. No. 37996.

1. **Administrative Law: Banks and Banking.** Findings of facts in the language of the statute are adequate in bank charter removal cases.
2. **Administrative Law: Public Officers and Employees.** It is a presumption of law that public officers will perform their public duties.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Acklie & Peterson and Donald H. Bowman, for appellant.

Clarence A. H. Meyer, Attorney General, Ralph H.

Gillan, Abrahams, Kaslow & Cassman, and Nelson, Harding, Marchetti, Leonard & Tate, for appellees.

Heard before SPENCER, BOSLAUGH, MCCOWN, and NEWTON, JJ.

SPENCER, J.

This appeal by Douglas County Bank challenges an order of the Director of Banking of the State of Nebraska granting the application of Ames Plaza Bank to transfer its charter and to move its bank to a new location. We affirm.

Ames was granted a bank charter in 1962 and commenced business in rented quarters in the Ames Plaza Shopping Center, with 12 employees and 3,290 square feet of space. It subsequently added 935 square feet of space to these facilities. Under the evidence adduced by Douglas, Ames might have enlarged its facilities more than it did, although there is a serious question as to whether the possibility suggested would have been suitable. At the time of the hearing before the Director, Ames had 46 employees in its main facility. The evidence is conclusive that Ames' present facility is so cramped and overcrowded that it is severely handicapped in attempting to meet the needs of its banking customers.

We do not deem it necessary to a clear understanding of the questions presented to review the evidence in detail or even to set forth the substance thereof. The main issue as we see it is whether the evidence will sustain the action of the Director. We think it sufficient to here state that we have carefully examined the record and are of the opinion that the order entered is fully supported by the evidence. We concern ourselves with other issues raised by Douglas.

The first assignment of error we notice is that the order of the Director is void for failing to contain legally sufficient findings of fact and conclusions of law. The

order entered by the Director contains eight findings of fact, including the following:

"5. That said bank is now located in a building of inadequate size to properly serve its customers and that additional space is not available.

"6. That said bank has an option to acquire property at the S. W. Corner of the Intersection at 72nd Street, Ames Avenue and Military Avenue, Omaha, Douglas County, Nebraska, upon which to construct a modern new building with a new modern vault for security purposes.

"7. That construction of the proposed building and the moving to the proposed new location will be a credit to the community and will better serve the customers of said bank.

"8. That the public necessity, convenience and advantage will be promoted by permitting said bank to move from its inadequate present location to the location set out in its application."

These findings adequately set out the factual basis for the order. Section 84-915, R. R. S. 1943, provides: "The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." The main contested fact issues were the adequacy of the present quarters, the unavailability of additional space, the suitability of the proposed site, and whether public necessity, convenience, and advantage would be promoted if the application were granted. These issues are clearly covered by the above findings.

While the conclusions of law set out in the Director's order may not be as fully enunciated as Douglas may wish, they are sufficient when considered with the findings of fact to support the order entered.

Douglas relies heavily upon Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211. That case involved the fixing of rates. This case involves the transfer of an existing bank charter to another location in the immediate vicinity. There

is a distinction. See First Nat. Bank & Trust Co. v. Ley, 182 Neb. 164, 153 N. W. 2d 743, which was a proceeding in error to review an order of the Department of Banking granting a new charter. There this court pointed out: "The appellants further complain that the findings of fact, which are in the language of the statute, are not sufficient. We have held that such findings of fact are not sufficient in rate cases. See Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211. But in this type of case, such findings are adequate. See Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752."

The second assignment of error we consider is the claim that Ames did not establish that the public necessity, convenience, and advantage would be promoted by the transfer of its charter. Douglas devotes a substantial portion of its brief to this point. It relies on Jackson v. Valley National Bank of Egan Township, 277 Minn. 293, 152 N. W. 2d 472, which it refers to as a recent landmark case. That case sets out 12 factors to be determined in answering the question preliminary to the issuance of a new bank charter, and has no relevancy herein. The instant case does not deal with the application for a new bank charter but rather the moving of an existing charter within the bank's present trade area. The proposed location is only 1 mile from the present one. The distance of Douglas from both the present and the proposed location is exactly the same, 1.3 miles. The record was sufficient to permit the Director to conclude that public necessity, convenience, and advantage would be promoted by the transfer of the charter.

The last assignment of error we consider is the contention that the Director failed to offer and include the results of any independent investigation made by the Department of Banking and Ames' application to the Federal Deposit Insurance Corporation as a part of the record herein.

Douglas first refers to section 8-122, R. S. Supp., 1969,

which has no application herein. That section involves the granting of a bank charter and not the removal of an existing one.

Douglas then refers to section 84-914 (3), R. S. Supp., 1969, which reads as follows: "All evidence including records and documents in the possession of the agency *of which it desires to avail itself* shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference." (Emphasis supplied.) We note the statute specifically provides that if the Department desires to avail itself of other evidence, it shall be offered and made a part of the record. There is no indication herein that the Director considered any evidence other than that adduced at the hearing. In fact, relative to the FDIC application, we note the following ruling of the Director when it was suggested the Director's copy be made a part of the record: "* * * the application to the FDIC is a confidential record as far as the FDIC is concerned, and we cannot disclose that as far as the Department here is concerned. As far as the Department is concerned, I feel that we have enough evidence before us at this time pertaining to the bank's intention as to what it is going to do with the site, and do not see at this point the need to go into—have the document submitted as part of the evidence in the matter."

Without some contrary showing, we presume that the Director complied with the statute. In Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710, we said: " 'It is a presumption of law that public officers will perform their public duties.' "

The judgment is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JERALD C. LILJA, APPELLANT.
192 N. W. 2d 160

Filed December 10, 1971. No. 38072.

1. **Appeal and Error: Rules of Courts.** Ordinarily this court will take note only of those assigned errors which are discussed. Revised Rules of the Supreme Court, 1967, Rule 8a2(3).
2. **Criminal Law: Trial: Evidence: Intoxicating Liquors.** The foundation for admission into evidence of a body fluid test showing compliance with the provisions of section 39-727.02, R. R. S. 1943, is sufficient.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Douglas McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from a conviction for drunk driving. Several errors are assigned but only one is discussed. We therefore take note only of the error assigned and discussed. Revised Rules of the Supreme Court, 1967, Rule 8a2(3).

The appellant asserts that there was no foundation for the introduction into evidence of a body fluid test under section 39-727.02, R. R. S. 1943. There is no merit in this assignment. The foundation was clearly sufficient. The specific claim is that the witness did not testify the test he made was approved by the Department of Health. The witness testified he held the proper permit from the Department of Health and this permit approves his making the test by a specific method known as the Bonnischen test. He described in minute detail the steps included in the Bonnischen test and specifically testified it was a method approved by the

Department of Health. He described in similar detail what he did, referring back in at least three instances to his prior description of the Bonnischen test. The steps taken in the actual test coincide with the test previously described. The court instructed the jury that the results of the test to be valid must be done in accordance with tests approved by the Department of Health. No reasonable person could, without completely disregarding the witness' testimony, conclude other than that the test was one approved by the Department of Health.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOE KRUG, APPELLANT.
192 N. W. 2d 163

Filed December 10, 1971. No. 38086.

Criminal Law: Plea Bargaining: Guilty Plea. When a defendant seeks to withdraw a plea of guilty or nolo contendere alleged to have been made in reliance upon a promise of the prosecutor of a recommendation favorable to the defendant, which promise is not kept, the burden of proof is on the defendant to prove the unfulfilled promise and reliance thereon.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

David L. Herzog, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from a sentence to a term of 2 years' imprisonment on a charge of receiving stolen property over the value of $100. The questions at issue are whether there was an unkept plea bargain by the prosecuting attorney and whether the defendant should be

granted leave to withdraw his plea of nolo contendere.

The defendant appeared in court on December 22, 1970, with his own counsel at which time the record shows he was arraigned and fully advised of the nature of the charge against him; the effect of a plea of guilty and the possible penalty; the nature and extent of his constitutional rights, including the right not to testify against himself, the right to a jury trial, compulsory process to witnesses on his behalf, and the right to cross-examine the witnesses; and that a plea of guilty waived these rights. He was told that if he understood all this he could plead either guilty or not guilty.

The defendant's attorney stated because of certain civil implications of the case it was his client's intention to enter a plea of nolo contendere. The court inquired of the defendant if that was his pleasure. The defendant answered: "Yes, sir." The court explained the elements of the offense and that defendant should not enter such a plea unless he felt the State was able to prove its case. The defendant's attorney explained to the court in the presence of the defendant that the prosecution had made its file available to the defense and he felt the State would be able to prove a prima facie case justifying submission to the jury. The court accepted a plea of nolo contendere and added that for purposes of sentencing it was the same as a plea of guilty.

Defendant's counsel had earlier advised the court that he proposed to ask for probation and would request a presentence investigation. The court referred the matter to the probation officer for investigation.

On February 9, 1971, the defendant appeared with his counsel for sentencing. The court advised that he had the presentence report and stated: "I frankly will tell you that it looks to me that probation is out definitely." Defense counsel made a lengthy plea in favor of probation which was founded principally upon an assurance of the defendant's cooperation with the victim of the crime in efforts to secure reimbursement through civil action

from other individuals of a total claimed loss of $20,000 or more but for which the defendant was responsible for only $1,000, $2,000, or $3,000 worth of goods found in his possession. The plea included the statement: "We asked the County Attorney to at one juncture, to make a gesture to the Court that probation be afforded to this defendant because of what we feel would be the inconsistency of putting this man in an institution."

Prosecutor stated among other things: "We had quite a bit of discussion on restitution and probation although I wasn't completely aware of Mr. Krug's background. I guess Dave wasn't either." The prosecutor itemized by truckload values the goods found in the defendant's possession: "$989.86, $422.70, $59.84, $81.74, $187.64," and ended: "Because of my discussions with Dave Herzog on this, I'm not going to make any recommendation whether he get probation or not. I'm afraid I have to put it in your lap, Your Honor."

Right of allocution was afforded and the defendant spoke in his own behalf. The court stated he was taking into consideration that the defendant did not put the State to the expense of a trial and imposed sentence.

On March 12, 1971, the defendant's counsel made an oral motion for leave to withdraw the plea of nolo contendere for the reason the prosecution had agreed to recommend probation and had not done so. No evidence of any kind was presented or offered in support of the motion. The court overruled the motion, stating that he could not consider placing the defendant on probation because the last probation did not do any good. The court pointed out two prior felony convictions of the defendant.

If a defendant's plea of guilty or nolo contendere is made in reliance upon an unfulfilled promise of the prosecutor of a recommendation favorable to the defendant, the courts have generally permitted withdrawal of the plea even after sentencing. See 112 U. Pa. L. Rev. 877, Note 68. This court, in State v. Pitzel, 181 Neb.

176, 147 N. W. 2d 524, said: "Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake, or under a misconception of the nature of the charge through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; when made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury."

The burden of proof is upon the defendant to show the unfulfilled promise and reliance thereon. People v. Bauman, 131 Cal. App. 2d 595, 281 P. 2d 74; Watts v. United States, 278 F. 2d 247 (D. C. Cir., 1960). It is typically stated that this means the defendant must establish grounds for withdrawal by clear and convincing evidence. People v. Singh, 156 Cal. App. 2d 363, 319 P. 2d 697. There is no such evidence here. The most the record shows is that the matter was discussed.

The defendant makes no showing that he is innocent. This is required by some courts. See 112 U. Pa. L. Rev. 877, Note 74. The record here rather conclusively indicates otherwise. See especially United States v. Paglia, 190 F. 2d 445.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REUBEN MURRAY, APPELLANT.
192 N. W. 2d 734

Filed December 17, 1971. No. 37905.

1. **Criminal Law: Evidence: Trial.** The evidence of the commission of other crimes than the one for which defendant is being tried is incompetent, irrelevant, and immaterial, and ordinarily prejudicial to the rights of the defendant.
2. ———: ———: ———. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Reuben Murray, appeals his conviction for shooting with intent to kill, wound, or maim. He alleges two assignments of error: (1) The insufficiency of the evidence to sustain the conviction; and (2) the overruling of his motion for a mistrial when the testimony of a witness suggested he was selling marijuana. We affirm.

The evidence is more than ample to sustain the conviction. The victim, Arthur Dean Lee, a black male, testified that the defendant, also a black male, in the company of a white man and two white women, entered a party at 4825 Sahler Street, between 3 and 3:30 a.m., November 22, 1969. The defendant and the other three individuals had been at the party previously and had been asked to leave, which they did. Lee, who had been invited, followed the four into the party. After he had been there a short time, he was approached by one of the hosts and asked if he knew the other black male. They were the only two black persons at the party. When he said he didn't, the host asked Lee if he would talk to him, which Lee did. Lee stated that when he approached the defendant he introduced himself and said: " 'Say, man, these people don't know you, so take it easy, you know. Just take it easy.' And he said, 'Okay, everything is cool.' And I turned and walked away."

Lee walked away from the defendant and started to visit with someone else, but heard something and turned

around and saw the defendant pull a gun from his coat which he pointed at him. Someone attempted to grab the gun but defendant pushed him aside and came toward Lee. He attempted to hit Lee with the gun. Lee grappled with him and they both fell over a couch and a shot was fired. They continued to struggle and five more shots were fired. At this time Lee did not know he was shot. Defendant ran out the door with Lee in pursuit, but Lee, who had been shot four times, could not follow. Several of the other witnesses testified to seeing defendant approach Lee with the gun, and to the shooting. When defendant pulled the gun, witnesses testified that he said, "Nobody move."

Defendant testified that Lee told him and his friend to leave, and pushed defendant toward the door. Someone told him Lee had a knife in his pocket. Lee had one hand on defendant's collar and was shaking him. Defendant took out his gun with the intention of hitting Lee, and Lee tried to throw him out the window. He fired no shots until Lee tried to push him out the window. However, the evidence is rather conclusive that Lee had no weapon and defendant was the aggressor.

Defendant's second assignment of error is premised on the overruling of his motion for a mistrial. During the examination of one of the witnesses, she was asked the question as to whether, when the defendant and Lee were talking, she had heard any conversation between the two of them. Her reply was as follows: "Just parts of sentences, like I heard, I think Art said something, 'We don't want any dope.' And they were talking very politely, Art was anyway, and he was asking Reuben to leave. He said that nobody wanted any. Well, he was trying to push some marijuana, he said, he politely told Reuben that no one wanted any." Defendant then made an objection, and a motion for a mistrial. The court overruled the motion for mistrial, but sustained the objection, ordered the answer stricken, and instructed the jury to disregard it. Defendant insists he was preju-

diced by this testimony because it inferred the commission of a totally unrelated crime.

It is a fundamental rule that the evidence of the commission of other crimes than the one for which a defendant is being tried is incompetent, irrelevant, and immaterial, and ordinarily prejudicial to the rights of the defendant. Here, however, the witness was merely reciting what she had heard immediately before the defendant drew a gun and shot the victim. It was a part of the transaction which culminated in the shooting and possibly the reason defendant was requested to leave. In this instance we do not find the evidence erroneous. It was admissible on the question of intent and to show the shooting was not accidental or in self defense. In any event, the court instructed the jury to disregard it. We said in State v. Riley, 182 Neb. 300, 154 N. W. 2d 741: "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes."

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE D. JURGENS, APPELLANT.
192 N. W. 2d 741

Filed December 17, 1971. No. 37915.

1. **Criminal Law: Sentences: Probation and Parole: Appeal and Error.** The suspension of sentence and the granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed.
2. **Criminal Law: Sentences: Appeal and Error.** A sentence within the limits prescribed by the statute will not be disturbed in the absence of an abuse of discretion.

3. **Time: Common Law.** At common law, fractions of days are counted as full days.
4. **Criminal Law: Sentences.** A sentence of imprisonment for a stated period should be sufficiently certain so that the accused and those charged with administering the sentence may readily determine its duration.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Russell A. Strom, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Defendant appeals from a sentence following his plea of nolo contendere to a charge of motor vehicle homicide. Defendant had been charged under the misdemeanor portion of section 28-403.01, R. S. Supp., 1969. Six assignments of error are made, which blend into the following: (1) Abuse of discretion by the trial court in not placing the defendant on probation; (2) excessiveness of sentence; (3) invalidity of the sentence because it is ambiguous and the authorities charged with administering the sentence will be unable to determine accurately the termination point; and (4) invalidity of the sentence because it calls for intermittent incarceration. We determine that assignments (3) and (4) are well taken. We vacate the sentence and remand the cause for resentencing.

The record shows that the court imposed a sentence of a fine of $500 and imprisonment in the county jail for a period of 50 days, and as a part of the sentence ordered: ". . . that the Sheriff of Gage County, Nebraska, be permitted to let the defendant out of confinement of the County Jail commencing Friday of each week at

5:00 P.M. and defendant to return on Sundays of each week at 7:00 P.M., and that aforesaid time shall not be credited to this sentence, and that the defendant be required to serve as part of the sentence from Sunday night at 7:00 p.m. to the following Friday at 5:00 p.m., and that said 50-day sentence shall commence from this date."

At request of the defendant's counsel, after the judgment of conviction but before sentencing, a hearing was held in support of a request for probation. Both the State and defendant presented evidence. The State's evidence was confined to facts surrounding the accident. There were no eyewitnesses. The defendant, age 22 and married, testified on his own behalf, but because of amnesia resulting from the trauma of the accident he had no significant recollections covering the period from shortly before the collision until he was on his way to the hospital. The State's evidence tended to show that the defendant had driven through a stop sign at a substantial rate of speed and collided with the vehicle of the decedent who was on the favored road. The evidence presented by the defendant through numerous witnesses evidenced his good character, industry, acceptability as a probation risk, and, except for two traffic offenses, a record free of law violations. The two traffic violations were for speeding and careless driving and occurred about 4 and 5 years before the date of the charge of which he was convicted.

The penalty for the offense of which the defendant was convicted is (1) a fine not to exceed $500, or (2) imprisonment in the county jail not to exceed 6 months, or (3) both such fine and imprisonment. § 28-403.01, R. S. Supp., 1969.

Former section 29-2218, R. R. S. 1943, made the granting of probation discretionary with the trial court. In an absence of an abuse of discretion the determination of the trial court not to suspend sentence and grant probation will not be disturbed. State v. Steinhausen, 180

Neb. 778, 145 N. W. 2d 584. Likewise a sentence imposed within the limits prescribed by the statute will not be disturbed in the absence of an abuse of discretion. State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808. It would appear to us that the court could in this case either grant probation or impose a sentence such as here imposed and, except for the intermittent nature of the incarceration and the ambiguous nature of the sentence, neither course would be an abuse of discretion.

The ambiguity in the sentence arises out of the provision, "that aforesaid time shall not be credited to this sentence," taken together with the rule that at common law fractional days are deemed whole days. Two interpretations are possible. The released time each weekend of 50 hours is to be served in 24-hour days and fractions thereof, or the defendant gets full credit for all fractional days of imprisonment and only the Saturday free is to be added. If the first alternative is used the defendant will be required to serve all or some part of 58 separate calendar days in jail extending over a calendar period of 68 days. In the second alternative he will be imprisoned all or part of 50 separate calendar days extending over a period of 61 days.

A sentence of imprisonment should be sufficiently certain so that in and of itself it advises the accused and those charged with its execution of its duration. 24 C. J. S., Criminal Law, § 1581, p. 560. Judges in imposing sentences should use precise language. State v. Laden, 42 N. J. Super. 540, 127 A. 2d 404; Simunov v. United States, 162 F. 2d 314.

At common law, fractions of days are ordinarily counted as full days. 86 C. J. S., Time, § 16, p. 901, footnote 7; State ex rel. Greb v. Hurn, 102 Wash. 328, 172 P. 1147, 1 A. L. R. 274; Municipal Improvement Co. v. Thompson, 201 Cal. 629, 258 P. 955; Bussey v. Hager, 82 Ga. App. 23, 60 S. E. 2d 532; Oliason v. Girard, 57 Idaho 41, 61 P. 2d 288. Although the cited cases do not involve computation of the duration of a sentence of imprisonment,

it would seem that the same rule should apply afortiori in the case of a sentence of imprisonment. It is apparent that if a court chose to impose the maximum sentence and made provision for intermittent incarceration similar to that here, it could then impose a sentence which in practical effect exceeded the maximum authorized by statute. If we assume that an intermittent sentence may be imposed it seems clear that a full day's credit must be given for each of the fractional days served. Under the circumstances here a full day's credit would have to be given for Fridays and Sundays.

The next question to be answered is, can the court impose a sentence providing for intermittent incarceration in the absence of the consent of the defendant to the interrupted nature of the term of imprisonment. We hold that it cannot. State v. Bigelow, 76 Ariz. 13, 258 P. 2d 409, 39 A. L. R. 2d 979. In the cited case under statutes similar to ours the court held that a 90-day sentence for drunk driving could not be imposed and at the same time the defendant permitted to serve it on only certain days of the week. That case came before the Supreme Court of Arizona on questions of law certified to it and the defendant sought to uphold the validity of such a sentence.

The judgment of conviction is affirmed, but the part of the judgment imposing sentence is reversed and the cause is remanded to the district court for the purpose of resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A UNITED STATES CORPORATION, APPELLANT, V. DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA ET AL., APPELLEES.
192 N. W. 2d 736

Filed December 17, 1971. No. 37932.

1. **Building and Loan Associations: Administrative Law: Statutes.** A reasonable interpretation of section 8-331, R. R. S. 1943, and other statutes dealing with regulation and control of savings and loan associations necessarily implies the power of the Department of Banking to approve or disapprove the establishment and operation of branch offices of savings and loan associations chartered and operating under the laws of this State.
2. ———: ———: ———. Legislative standards for the granting of an application for initial establishment of a savings and loan association operation under section 8-331, R. R. S. 1943, also apply to an application to establish a branch office.
3. ———: ———: ———. Approval by the Department of Banking is necessary before a savings and loan association, chartered and operating under the laws of Nebraska, may establish a branch office.
4. **Building and Loan Associations: Constitutional Law: Notice.** Properly conducted existing local savings and loan associations have interests and rights which are affected by the establishment of other local savings and loan associations or branches sufficient to make all such associations interested parties entitled to constitutional due process.
5. **Building and Loan Associations: Constitutional Law: Notice: Administrative Law.** Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute.
6. **Statutes: Constitutional Law: Notice: Administrative Law.** Compliance with the mandatory provisions of section 84-913, R. R. S. 1943, requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing is necessary to give validity to its action when notice and hearing are essential to due process.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

John W. Delehant, John E. Dean, and Robert J. Huck, for appellant.

Ralph H. Gillan, for appellee Department of Banking.

James J. Fitzgerald, Jr., Lyle E. Strom, and Douglas W. Reno, for appellee Commercial Sav. & Loan Assn.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

MCCOWN, J.

First Federal Savings and Loan Association, a federally chartered corporation, brought this action against the Department of Banking and Commercial Savings and Loan Association, a Nebraska chartered corporation. The action sought to enjoin the enforcement of an order issued by the Department of Banking allowing Commercial to establish a branch office in Omaha, Nebraska; to declare the order invalid and of no effect; and to require the Department of Banking to establish procedural rules and regulations governing the establishment of a branch office by a state chartered savings and loan association. The trial court found that the statutes of Nebraska neither prohibit nor require either notice or hearing for the establishment of savings and loan branch offices and that the Administrative Procedures Act did not apply. The district court denied the request for injunction and dismissed plaintiff's petition. First Federal has appealed.

Both savings and loan associations involved here were operating in Omaha, Nebraska, in 1968. In that year, each association began to consider a new branch location in northwest Omaha. On December 19, 1968, First Federal passed a resolution to build a branch office. On January 16, 1969, Commercial passed a resolution for its new branch facility. First Federal, following adoption of its resolution, made application to the Federal Home Loan Bank Board for approval of a branch at 90th and Maple Streets in Omaha. Notice of its ap-

plication was published on January 30, 1969, as required by law. Letters of notice were also sent to savings and loan associations in the area and to the Department of Banking. Commercial received notice by January 30, 1969, and the Department of Banking received written notice on January 28, 1969.

On February 10, 1969, Commercial requested a meeting with the Director of the Department of Banking and met with him on February 17, 1969. On February 18, 1969, without notice or hearing, the Department of Banking issued an order approving the application of Commercial for the establishment of a branch office at 90th and Maple Streets in Omaha.

Commercial completed the purchase of land at the location on March 21, 1969, and on the same date notified the Federal Home Loan Bank Board of its expansion. Commercial also informed the Federal Home Loan Bank Board that it would protest the application of First Federal. The Federal Home Loan Bank Board denied First Federal's application on August 13, 1969. On September 25, 1969, First Federal filed this action. Commercial's branch office was completed on January 9, 1970. The Federal Home Loan Bank Board, on April 7, 1970, reversed its former decision and granted permission for First Federal to locate its branch at 90th and Maple also. Both branches have now been completed and are in operation.

One other fact situation needs chronological reference. On February 1, 1962, the Director of the Department of Banking notified all state chartered savings and loan associations that it was the opinion of the department that the statutory criteria which applied to the initial approval of the establishment of savings and loan associations applied to the establishing of branches as well. That notice required that immediately thereafter applications for a branch office must be submitted to the Director of the Department of Banking for approval. On August 1, 1962, a statement of policy relating to applica-

tions for certificates of approval to organize savings and loan associations and for authority to establish branch offices was issued by the Department of Banking over the signature of the Director. It contained a paragraph stating: "As directed by a letter dated February 1, 1962, no building and loan association shall establish a branch office without prior approval from the Department of Banking. It is required that an application upon a form to be supplied by the department shall be filed with said department. After the filing of such application the Director of Banking will give due notice for a public hearing to be held at the place which he designates to hear all evidence in favor of the establishment of such branch and all evidence by those opposing the establishment of such branch office." The evidence is very indefinite as to how fully or for what periods of time the statement of policy was adhered to. In a letter to the Federal Home Loan Bank Board dated March 13, 1969, the deputy director of the Department of Banking stated that as to the establishment of branch offices, the statement of policy was "hereby rescinded."

It is the position of Commercial that a state chartered savings and loan association is not required to obtain permission from the Department of Banking before opening a branch office; that even if it were, First Federal has no standing to challenge the approval order; and that notice and hearing is not a statutory or constitutional requirement.

The statutes of Nebraska do not expressly prohibit nor require the approval of the Department of Banking before establishing a branch office by state chartered savings and loan associations. The Department of Banking by statute has general supervision and control over all savings and loan associations which are declared to be quasi-public in nature and subject to regulation and control by the State. See, §§ 8-102, R. R. S. 1943, and 8-301, R. R. S. 1943.

Section 8-331, R. R. S. 1943, specifically provides for

the issuance of a certificate of approval upon the initial establishment of a state chartered savings and loan association before it shall transact any business. Among other things, that section provides that no such certificate of approval shall be issued unless and until the Department of Banking shall have determined: "* * * (3) That in its judgment a need exists for such an institution in the community to be served; (4) That there is a reasonable probability of its usefulness and success; and (5) That the same can be established without undue injury to properly conducted existing local building and loan associations."

The issues here require an analysis of the legislative intent and purpose in adopting the statutes dealing with the quasi-public business of savings and loan associations. Section 8-331, R. R. S. 1943, clearly establishes that the function of the Department of Banking in determining whether or not a state chartered savings and loan association shall be issued a certificate of approval to transact business initially is clearly a quasi-judicial determination. The standards set in that statute require a determination of the public interest. The standards not only place emphasis on the locality in which the association is to be established, but specifically require a finding that initial establishment be done without undue injury to properly conducted existing local savings and loan associations. If the legislative purpose in regulating, supervising, and controlling the operation of savings and loan associations was to protect the public and guard against economically destructive competition between savings and loan associations in a given area, that purpose could be frustrated and the effectiveness of the legislation destroyed if existing institutions could open branch offices at any places they desired without the approval of anyone.

We hold that a reasonable interpretation of section 8-331, R. R. S. 1943, and other statutes dealing with regulation and control of savings and loan associations neces-

sarily implies the power of the Department of Banking to approve or disapprove the establishment and operation of branch offices of savings and loan associations chartered and operating under the laws of this State. We also hold that legislative standards for the granting of an application for initial establishment of a savings and loan association operation under section 8-331, R. R. S. 1943, also apply to an application to establish a branch office. The holding here is fully supported by the reasoning and policy considerations set forth in Southwestern Savings & Loan Assn. of Houston v. Falkner, 160 Tex. 417, 331 S. W. 2d 917 (1960).

Commercial insists that the statute does not expressly require approval before opening a branch office and therefore no such approval is necessary. At least two Directors of the Department of Banking obviously felt that the department had authority to require such approval or to waive it. Commercial had itself applied for such approval in at least one instance prior to the current one. It is illogical to assume that the Legislature intended to regulate and control the establishment of savings and loan associations but did not intend to extend that control over the establishment of branches. Neither is there any indication the Legislature intended the Department of Banking should have the right to exercise or not to exercise control over the establishment of branches without any standards limiting its discretion. We hold that approval by the Department of Banking is necessary before a savings and loan association, chartered and operating under the laws of Nebraska, may establish a branch office.

Commercial contends that First Federal is simply a competitor and has no interest sufficient to give it standing to question the order entered here. It is necessary to show that a party is in danger of sustaining a direct injury as a result of action and it is not sufficient that one has merely a general interest common to all members of the public. See Ex Parte Levitt, 302 U. S. 633,

58 S. Ct. 1, 82 L. Ed. 493. There should be little question that First Federal has standing to challenge the order entered here. If a competing savings and loan association does not have standing to challenge the validity of an administrative decision favorable to the applicant, such an order would almost never be subject to challenge, nor could anyone raise the issue of whether statutes were being complied with or not. See Elizabeth Federal Savings & Loan Assn. v. Howell, 24 N. J. 488, 132 A. 2d 779.

We note that section 8-331, R. R. S. 1943, dealing with the initial establishment of savings and loan associations does not require any notice or hearing. It is apparent that statutes which grant quasi-judicial powers to an administrative agency but fail to provide for notice of hearing to those whose interests would necessarily be affected by the exercise of that power may be unconstitutional. It is also apparent that the provisions of the Administrative Procedures Act, sections 84-901, R. R. S. 1943, et seq., may breathe constitutionality into an otherwise deficient statute provided the provisions of that act are complied with. The provisions of section 8-331, R. R. S. 1943, make it clear that existing local savings and loan associations have interests and rights which are affected by the establishment of other local savings and loan associations or branches sufficient to make all such associations "interested parties" entitled to constitutional due process. See, also, § 84-901 (3), R. R. S. 1943. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458. See, also, Allen v. Omaha Transit Co., Inc., *ante* p. 156, 187 N. W. 2d 760.

The final issue remaining for determination is whether

or not constitutional due process requires that the Department of Banking be directed to establish procedural rules and regulations, including provisions for reasonable notice and hearing and governing the establishment of a branch office by a state chartered savings and loan association. The provisions of the statutes dealing with the regulation and control of savings and loan associations and the provisions of the Administrative Procedures Act may properly be considered in para materia in determining whether or not due process of law has been afforded. Compliance with the mandatory provisions of section 84-913, R. R. S. 1943, requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing is necessary to give validity to its action when notice and hearing are essential to due process. School Dist. No. 8 v. State Board of Education, *supra*.

The order of the Department of Banking of the State of Nebraska of February 18, 1969, was invalid. The Department of Banking should be required to establish procedural rules and regulations governing the establishment of branch offices by a state chartered savings and loan association in accordance with the provisions of the Administrative Procedures Act and in accord with this opinion. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED WITH DIRECTIONS.

EVE B. ORTEGA, APPELLANT, V. NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, A CORPORATION, APPELLEE.
193 N. W. 2d 254

Filed December 17, 1971. No. 37964.

1. **Insurance: Trial: Evidence: Contracts.** The delivery of a life insurance policy and the acceptance of premiums raise a presumption that all conditions precedent such as continued insurability have been met and this presumption is sufficient to sustain the plaintiff's burden of proof unless the defendant introduces evidence to rebut it.

2. **Insurance: Fraud and Deceit: Contracts.** In the absence of fraud or misrepresentation, a health defect existing but undetected on the date of the medical examination cannot later be advanced as a breach of a continued insurability clause.
3. ———: ———: ———. If a medical examination is made by the insurer, either with knowledge of an illness of the applicant thereby disclosed or without discovery of a pathological condition which in fact existed, and it thereupon issues a policy of insurance, it should not be allowed to repudiate liability by reason of the defective health of the insured at the time of the examination, in the absence of any fraud or misrepresentation.
4. **Insurance: Trial: Evidence.** Where the evidence introduced by the insurer is wholly insufficient to rebut the presumption that the plaintiff was in good health at the date of the issuance of the policy, it is error for the trial court to submit such issues to the jury.
5. **Insurance: Fraud and Deceit: Contracts.** Generally, an applicant for insurance has no duty to inform an insurer of new information about his health where the insurer fails to inquire into the existence of any new information after the medical examination.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Robert W. Green and Larry W. Myers, for appellant.

James W. Knowles and Edward A. Mullery, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

Plaintiff sues as a beneficiary of a $99,000 life insurance policy. The insured deceased Ortego died of lung cancer shortly after the issuance of the policy. The issues (which overlap) are: (1) Whether Ortega breached a condition precedent requiring continued insurability between the time of the application and the issuance and receipt of the policy; and (2) whether Ortega intentionally failed to disclose certain material facts concerning

the lung cancer arising between the medical examination and the issuance of the policy. The district court submitted these issues to the jury which found for the defendant insurance company. A motion for judgment notwithstanding the verdict was denied. Based on the undisputed facts, we reverse the judgment of the district court and remand the cause with directions to enter judgment for the plaintiff.

Issuance of the policy, payment of the premium, and delivery are admitted by the defendant. In August of 1968 Ortega was contacted by John Adair, an agent of the defendant, regarding the purchase of the life insurance policy from the defendant. After some preliminary discussion, Ortega signed an application for the policy on August 23, 1968, and delivered it, undated, to Adair. The application was forwarded by Adair, the agent of the defendant, to the home office on September 16, 1968, at which time he dated it. The signed application contained the following relevant clauses:

"C. The insurance policy hereby applied for shall not be considered in force until a policy shall have been issued by the Company * * * and said policy received and accepted by the Owner and the first premium paid thereon, *all during the continued insurability of the person to be insured;* * * *.

"D. The Company shall have sixty days from the date hereof within which to consider and act upon this application and if within such period a policy has not been received by the owner or notice of approval or rejection has not been given, then this application shall be deemed to have been declined by the Company." (Emphasis supplied.)

As mentioned, the application was signed and delivered to Adair on August 23, 1968. On August 30, 1968, Ortega was examined by Dr. Richard Barry, a doctor of the defendant's choice. The doctor approved him for insurance. No chest X-ray was taken. The application and the results of the examination were forwarded to

the home office of the defendant in Chicago. No contention is made that the statements or representations made by Ortega in the application were in any way false or constituted a misrepresentation that would void the policy. The defendant assembled all of the facts it deemed necessary for determining acceptance, finished the processing of the application in its own internal operating procedure, and approved Ortega's application on October 24, 1968. On October 31, 1968, Adair informed Ortega that the policy had been approved and that he should pay the premium. The following day Ortega met with Adair and paid the premium. On neither occasion, October 31st or November 1st, did Ortega mention any recent health developments or make any disclosure as to any change in his condition. The evidence is conflicting as to the date the policy was delivered, but the parties agree that it was not later than November 6, 1968.

On November 6, 1968, therefore, the policy had been approved by the defendant (October 24th), forwarded to Adair, the premium paid, and the policy delivered to Ortega.

The essential facts relied upon by the defendant are as follows: On October 26th and 27th, 2 or 3 days after the approval of the policy by the home office of the defendant in Chicago, Ortega, returning from a trip, experienced pain in his right shoulder and coughed up blood. These incidents led him to consult his personal doctor, Dr. Henry Lehnhoff, on October 29, 1968. For the first time, on October 29, 1968, X-rays were taken and analyzed by Ortega's own doctor, Dr. Lehnhoff, and they revealed a shadow on Ortega's right lung indicating a possible malignancy. No confirmed diagnosis was made at this time, only a communication to Ortega of a shadow on his lung and a possible malignancy. Dr. Lehnhoff referred Ortega to Dr. Delbert Neis, a specialist in thoracic surgery, for further examination and diagnosis. Dr. Neis, after examination, was very suspicious of lung cancer and recommended surgery. Although

Ortega's doctors were suspicious, the evidence conclusively shows no biopsy or confirmed diagnosis of lung cancer had been communicated to him as late as November 1st. On November 6th, Ortega entered the hospital and surgery was performed on November 8th. During the operation, the hospital pathologist confirmed the tentative diagnosis of lung cancer, and Dr. Neis removed Ortega's right lung. From complications resulting from this surgery Ortega died in the hospital on November 12, 1968. The defendant rejected the plaintiff widow's claim and offered to refund the premium.

We reach the issue of "continued insurability." The acuity and industry of counsel have produced for our consideration a veritable kaleidoscopic display of authorities and analyses covering every tangent and facet of the facts and the law. The function of the "continued insurability" clause is to protect the defendant against sudden changes in health arising in the interval between a medical examination and the consummation of the policy. The approval by the defendant on October 24, 1968, the subsequent delivery of the policy and the acceptance of the premium raise a presumption that all conditions precedent such as "continued insurability" have been met and this presumption is sufficient to sustain the plaintiff's burden of proof unless the defendant introduces evidence to rebut it. Gallentine v. World Ins. Co., 167 Neb. 429, 93 N. W. 2d 374.

There is no contention of fraud or misrepresentation in the application by Ortega. It was delivered to the agent of defendant on August 23, 1968. Independent of the application, the defendant itself set up the conditions and the requirements by which it would determine the insurability of Ortega. It required a medical examination. The nature, scope, and extent of the physical and medical examination were entirely within the power of the defendant. It had Ortega examined on August 30, 1968. The doctor did not see fit to take a chest X-ray of Ortega or otherwise explore and deter-

mine the condition of his lungs. The defendant's doctor approved Ortega as "insurable." It follows that by so doing it assumed the risk of any later detected health defects existing at that time. The defendant itself set up the conditions of reliance for the issuance of the policy. Ortega complied in every respect with the requirements and conditions that the defendant required. Under the facts in this case, it is clear that the defendant seeks to retroactively establish and take advantage of error in its own examination and processing procedures prior to the actual issuance of the policy and the receipt of the premium. The defendant has a legitimate interest to protect in the period of time between its medical examination and the final issuance of the policy. A sudden heart attack or a serious accident and other sudden health developments fall within the legitimate range and the protection of the continued insurability clause. On the other hand, literal enforcement of the condition is harsh because, by its terms, it is operative irrespective of fraud or misrepresentation or knowledge on the part of the insured. We hold, in the absence of fraud or misrepresentation, that a health defect existing but undetected on the date of the medical examination cannot later be advanced as a breach of a continued insurability clause. Mathews v. Metropolitan Life Ins. Co., 89 So. 2d 641 (Fla., 1956); cf. Schodts v. American Hospital & Life Ins. Co., 313 S. W. 2d 946 (Tex. Civ. App., 1958); Adams v. Lasalle Life Ins. Co., 99 S. W. 2d 386 (Tex. Civ. App., 1936); Brubaker v. Beneficial Standard Life Ins. Co., 130 Cal. App. 2d 340, 278 P. 2d 966; Wargovich v. Metropolitan Life Ins. Co., 136 Pa. Super. 421, 7 A. 2d 568; National Life & Accident Ins. Co. v. Green, 191 Miss. 581, 2 So. 2d 838; Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 A. 793 (1936).

A succinct statement of the rule and the reason therefor appears in Prudential Ins. Co. of America v. Kudoba, *supra*. In that case the court made the following statements: "If an examination is made and the company,

either with knowledge of an illness of the applicant thereby disclosed or without discovery of a pathological condition which in fact existed, thereupon issues a policy, it should not be allowed to repudiate liability by reason of any defective status of the health of the insured at that time, * * * the sound-health clause has no application to such diseases as the insured may have had at the time of the medical examination." "While it is true that ordinarily a contract conditioned upon the existence of a certain fact is unenforceable if the condition is unfulfilled * * * this principle is not fairly applicable to life insurance policies, where regard must be had to the fundamental social and economic factors underlying the whole fabric of the business of life insurance as practically conducted. * * * For the company later to be allowed successfully to contend that the policy never became effective because the applicant breached the sound-health clause in that he suffered from disease or bodily impairment when the policy was delivered to him, in a case where the same condition existed when the company examined him, would be to give countenance to a practice that, while perhaps not fairly to be characterized as fraudulent, would be unreasonably destructive of the protection which life insurance is aimed to secure. It would result * * * that 'no one would ever know if he were insured or not, even though he has passed a medical examination and received a policy.'"

We turn now to the period of time between the medical examination by the defendant's doctor on August 30, 1968, until the time of the consummation of the policy. Was the continued insurability clause breached during this period of time? As we have mentioned the function of the clause is to protect the defendant against sudden changes in health arising in the interval between the medical examination and the consummation of the policy. From what we have said, and giving full scope to the proper interpretation of the continued insurability clause, it was breached, under the circumstances in this case

only if the tumor was not present on August 30 but developed in the interim before the policy was consummated. For the defendant to prevail, it must prove that Ortega's tumor was not present on August 30, the time of the medical examination approval, but that it developed subsequent to that date. There is no evidence in the record of any nature whatsoever to sustain this contention. Further, it would appear that the defendant not only did not but could not do this. It failed to have any chest X-rays taken on August 30, 1968. Both Dr. Lehnhoff and Dr. Neis testified that they could not determine with reasonable medical certainty when the tumor developed. The record reveals the defendant had ample opportunity to discover the nature and degree of progression of the malignancy. Neither by way of cross-examination nor direct medical testimony, did the defendant present any medical testimony as to the type of malignancy and whether such type of malignancy could have or must have developed in the critical period of time between August 30, 1968, and the date of the issuance and receipt of the policy. This failure, we feel, is significant. The only other evidence on this issue is the death certificate, when Dr. Neis originally estimated the onset of the tumor as sometime in August 1968. Since the medical examination by defendant's doctor took place on August 30, 1968, at the very end of the month, this would tend to affirmatively suggest that the tumor was present at the time of that examination. There is no evidence to sustain a finding that the onset of the tumor was subsequent to August 30, 1968. It was therefore error for the court to submit these matters to the jury under proper instructions, because there is no evidence in the record from which a jury could reasonably conclude that the tumor was not present on the date of the medical examination on August 30, 1968. These facts bear direct relation to the operative legal principles applicable to this case. If the tumor had been present on August 30, 1968, the defendant's doctor

on proper examination could have discovered it by the means of a chest X-ray. Not only did the defendant's doctor fail to take a chest X-ray, but the defendant's own procedure did not mandatorily require a chest X-ray examination and left this to the discretion of the examining doctor. The defendant itself established the procedures to protect itself. It was free to examine Ortega as exhaustively as it liked. Its very purpose was to check upon the representations of application and to discover as comprehensively and as thoroughly as it wished, latent disease and health conditions that were material to its final judgment in accepting the risk on October 24, 1968. Its hindsight discovery, subsequent to Ortega's death, shall not be ripened into a retroactive curing of its original error or failure to take the steps that its own procedure permitted or should have required.

The defendant contends that Ortega breached the duty to it to disclose material information about his health which he learned after the medical examination and before the consummation of the contract. After experiencing pain in his right shoulder and coughing up blood on October 26 and 27, 1968, Ortega consulted his personal doctor, Dr. Henry Lehnhoff, on October 29, 1968. X-rays revealed a shadow on Ortega's right lung. This information was disclosed to Ortega; he was referred on November 1, 1968, to Dr. Delbert Neis, a thoracic surgeon. Dr. Neis recommended surgery, which was performed on November 8, 1968, at which time, on biopsy, diagnosis of lung cancer was confirmed for the first time. Despite the fact that the home office had already approved the policy, and on October 31st the defendant had informed Ortega that the policy had been approved, and that Ortega paid the premium on November 1, 1968, the very day that he first consulted Dr. Neis, the thoracic surgeon, the defendant contends that Ortega had an affirmative duty to seek it out and to disclose this information.

We reject this contention. In the first place, we ob-

serve that neither Ortega nor his doctors, including the thoracic surgeon, had any confirmed information as to malignancy until November 8, 1968, at least 2 days after the delivery of the policy. It is true, of course, that Ortega was advised by his personal doctor that the situation revealed by the X-rays of his chest was suspicious. At that time the policy had already been approved by the home office of the defendant and one day before he consulted the thoracic surgeon on October 31, 1968, the defendant's agent had informed Ortega that the policy had been approved. No inquiry was made by Adair, the agent, nor was Ortega asked to make any disclosures concerning the condition of his health. It is clear to us that the contention of the defendant herein would require a layman, after information that his policy had been approved and while consulting his doctor, to form a medical judgment as to the nature and extent and seriousness of his complaints and symptoms and to affirmatively advise the insurance company of such suspicions, even in the absence of no inquiry, examination, or request by the insurer. We reject such a harsh and impractical rule. Injustice of such a rule is apparent under the circumstances in this case when we reflect that the defendant's position, in effect, is to require Ortega, a layman, even without any firm diagnosis by his own doctors, to disclose and inform the agent of the defendant concerning a condition which the defendant's own doctor failed to examine into and to determine at the time of the medical examination. In only one case has our court specifically passed upon the question involved here. We adhere to the rule announced in Merriman v. Grand Lodge Degree of Honor, 77 Neb. 544, 110 N. W. 302, which holds generally that an applicant for life insurance has no duty to voluntarily inform the insurer of new information about his health which arises after a medical examination by the insurer. In that case the trial court erroneously instructed the jury as follows concerning the duty to inform the insurer: "In con-

sidering the question whether any statement made by the deceased, Katherine Merriman, was true or false, you should consider it as of the time she signed the application, *up to and including the time when the contract between her and the defendant company was completed,* being the time of the final approval of the application by the company * * *. This is true, for the reason that *up to the time of the final approval of the application it would be her duty to correct any statement, contained in her application made by her, which she subsequently learned was false.*" (Emphasis supplied.) Our court reversed on the basis that the above instruction was erroneous and for failure to grant the beneficiary's request for instruction confining the applicant's knowledge of her medical condition to the time the application was signed. The court in that case discussed the consideration underlying its announcement of the following rule: "Consequently when an application is made and approved, there is no duty on the holder of the certificate issued on such application to notify the company of any subsequently discovered evidence of pregnancy, nor would the fact, if subsequently discovered, prevent her from certifying that she was in sound bodily health, if such certificate is otherwise true. The only representation here is as to her apparent state of health, and all of the evidence in the record shows that at the time (the time of the filing of the application) she was, to all appearances, a robust and healthy woman."

In an almost identical case, Ames v. New York Life Ins. Co., 154 Minn. 111, 191 N. W. 274, the Minnesota court said as follows: "Unlike most of the cases in which the doctrine has been asserted, the negotiations between the parties were no longer pending and no deception was practiced to get possession of the policy. Appellant (the company) and its agent were the actors. Uninfluenced by anything said or done by the applicant or his agents, without inquiry, and of its own motion, it delivered the policy and called for and received the premium. It is

difficult to spell out fraud from anything that was said or done, or left unsaid or undone."

Corollary to the above holding, and pertinent to our determination here is the general principle announced by the cases that an applicant for insurance has no duty to inform an insurer of new information about his health where the insurer fails to inquire into the existence of any new information after the medical examination. Metropolitan Life Ins. Co. v. Devore, 66 Cal. 2d 129, 56 Cal. Rptr. 881, 424 P. 2d 321; Harte v. United Benefit Life Ins. Co., 66 Cal. 2d 148, 56 Cal. Rptr. 889, 424 P. 2d 329; Commonwealth Life Ins. Co. v. Rider, 153 Ky. 130, 154 S. W. 906; American Bankers Life Assurance Co. of Florida v. Toth, 165 So. 2d 804 (Fla. App., 1964). It is true that the insurer has a right to know about any intervening conditions material to the risk it assumes, between the time of the application, the medical examination, and the final issuance of the policy. It may during this period of time completely reject the application and policy for any reason; it may make any inquiry or investigation concerning the health of the insured that it sees fit to inquire into. No issue is presented in this case that concerns this area, for the simple reason that no inquiry of any nature whatsoever was made by Adair, the agent, or any agent of the defendant prior to the time of the issuance of the policy and the receipt of the premium. Faced with the force of the Merriman holding and the equities of the situation, the defendant in this case asks us to overrule the Merriman case and follow the law of other jurisdictions. We think, however, that the Merriman case is sound and that the increasingly available opportunities and capacity for an insurance company to protect itself in this area indicate that it should be followed. Strong considerations of public policy indicate that where an insured has restructured his estate and financial situation, relying upon the availability of life insurance, a rule should not be adopted which permits a retroactive examination by an

insurance company, after death of the insured, and void the policy, absent fraud or misrepresentation or a positive violation of the conditions of the insured's contract material to the risk thereto. For this court to hold for the defendant, "* * * would be to give countenance to a practice that, while perhaps not fairly to be characterized as fraudulent, would be unreasonably destructive of the protection which life insurance is aimed to secure. It would result * * * that 'no one would ever know if he were insured or not, even though he has passed a medical examination and received a policy.'" Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 A. 793 (1936).

The home office approved the policy. Adair was the agent of the defendant, he knew Ortega, could make any inquiry or request any information of Ortega that he desired, saw fit not to, and delivered the policy and received the premium, all prior to the operation on Ortega and the first confirmed disclosure of an uninsurable condition of lung cancer. Ortega was a good enough risk for the defendant to accept after a medical examination of scope and extent of its own choosing, and was a good enough risk for the defendant to accept his premium payment without further inquiry as to the condition of his health after the medical examination. This being true, he was a good enough risk for the defendant to pay this insurance now that he is dead. See Independent Life Ins. Co. v. Rider, 150 Ky. 505, 150 S. W. 649 (1912).

Under the material undisputed facts in this case the plaintiff was entitled to judgment as a matter of law, and the submission of the issues of continued insurability and the duty to disclose was error.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

DOROTHEA M. ROGERS ET AL., APPELLEES, IMPLEADED WITH RAY T. ROGERS, APPELLEE, V. JON L. NEIMAN, APPELLANT.
193 N. W. 2d 266

Filed December 17, 1971. No. 37988.

1. **Contracts: Words and Phrases: Courts.** In construing a writing the words used should be given their ordinary and popularly accepted meaning in the absence of explanation or qualification.
2. **Contracts: Words and Phrases.** A provision in a lease granting the lessee an option to purchase in the event "the lessors shall place the premises up for sale" does not apply to the sale of an undivided interest in the premises by one lessor to another lessor.

Appeal from the district court for Thomas County: WILLIAM F. MANASIL, Judge. Affirmed.

Murphy, Pedersen & Piccolo, for appellant.

Joseph J. Divis, Thomas O. David, and Jewell, Otte, Pollock & Gatz, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This case arises out of a controversy concerning a ranch lease executed by Dorothea M. Rogers, Ethelle H. Wiese, Hazel M. Wiese, Evelyn Thompson, and A. Arlyne Werner as lessors and Jon L. Neiman as lessee. The lessors were tenants in common. The lease contained a provision that in the event "the lessors shall place the premises up for sale," the lessee shall have an option to purchase by meeting the highest responsible bid within 60 days after notice of the bid.

The lease expired on April 30, 1964. On November 16, 1963, Evelyn Thompson sold her undivided one-fifth interest in the property to Dorothea M. Rogers and her husband. On November 18, 1963, Hazel M. Wiese sold her undivided one-fifth interest in the property to Dorothea M. Rogers and her husband. Neiman contends that under the lease he had an option to purchase the undivided interest of a lessor in the event the lessor offered

her interest for sale; and that he is entitled to specific performance of the option provision of the lease as to the two undivided one-fifth interests which were sold.

The trial court refused specific performance. Neiman appeals. The only question presented is whether Neiman is entitled to specific performance of the option provision of the lease.

Neiman argues that the lease was, in effect, a separate lease of the undivided one-fifth interest of each of the lessors; and that the option provision was an agreement by each of the lessors that if her undivided one-fifth interest in the property was offered for sale, he had an option to purchase the interest by meeting the highest responsible bid.

The agreement was that if "the lessors shall place the premises up for sale," Neiman would have an option to purchase. We think the proper construction of the lease was that an option existed only if the entire property was offered for sale by all of the lessors. This is the ordinary and popularly accepted meaning of the words used. Peetz v. Masek Auto Supply Co., Inc., 161 Neb. 588, 74 N. W. 2d 474. See, also, James, Option Contracts, § 811, p. 314.

Neiman first asserted his claim under the option provision in an amended answer and cross-petition filed November 24, 1967. On August 24, 1963, Ethelle H. Wiese, as agent for the lessors, had written to Neiman stating: "As I explained to you, the purchase of two portions of the ranch by my sister, Mrs. Ray Rogers, is pending." The deeds from Evelyn Thompson and Hazel M. Wiese to Mr. and Mrs. Rogers were both recorded on April 30, 1964. Neiman's delay in asserting any claim under the option provision until more than 3 years after the lease had expired suggests that he understood it to mean that the option applied only to a sale of the entire property by all of the lessors.

The judgment of the district court is affirmed.

AFFIRMED.

CHARLES BESHALER, APPELLEE AND CROSS-APPELLANT, V. BEN J. HELBERG AND GLEN HELBERG, DOING BUSINESS AS WESTERN LIVESTOCK AUCTION COMPANY, ET AL., APPELLANTS AND CROSS-APPELLEES.

193 N. W. 2d 261

Filed December 23, 1971. No. 37982.

1. **Verdicts: Judgments: New Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. **Trial: Evidence.** If plaintiff without reasonable explanation testifies to facts materially different from his deposition concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is to be discredited and should be disregarded.
3. **Insurance: Attorneys at Law: Fees: Motions, Rules, and Orders.** A claim for an attorneys' fee after judgment in favor of plaintiff in his action on a fidelity policy or bond may be presented by motion at a subsequent term of court.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed in part, and in part reversed and remanded with directions.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellants.

Beatty, Morgan & Vyhnalek, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an action by Charles Beshaler against Ben J. Helberg and Glen Helberg, and National Surety Corporation of New York, their bonding company, on the bond required under the Packers and Stockyards Act of 1921, for the balance due on the sale of 238 steers which sold for $31,911.36. Defendants Helberg withheld $19,500 from the proceeds, contending this amount had been loaned to Paul Geiser, an alleged partner of Beshaler,

for feed and transportation costs for the cattle. The jury returned a verdict for Beshaler on which judgment was entered. Beshaler cross-appeals from the disallowance of an attorneys' fee. We affirm the judgment and reverse the disallowance of the attorneys' fee.

During October 1961, Beshaler purchased 1,916 head of calves from Kiewit Ranches and paid for them with his personal check in the amount of $215,644.33. Geiser, an order buyer licensed under the Packers and Stockyards Act, acted as the agent of Peter Kiewit in the sale of the calves to Beshaler. Most of these calves were resold by Beshaler. Of those not sold, 207 head were put on wheat pasture in Texas, and 240 head on wheat pasture at Plains, Kansas. The proceeds of the 240 head that were at Plains, Kansas, are involved in this litigation.

Beshaler made arrangements with Geiser to take care of handling the calves in Texas and Kansas, and agreed that his compensation would be one-half of whatever gain was made, but Geiser was to see to the transportation and feed, and to take care of the calves. In January of 1962, the wheat pasture in Kansas froze and it was necessary to move the calves. Beshaler decided they should be sold, and on January 17, 1962, had them brought to the Western Livestock Auction Company, operated by the Helbergs at North Platte, Nebraska. Geiser's only interest in the calves was a share in the profits, if any.

On November 19, 1961, Geiser purchased 208 cull cows from a Kiewit ranch in Montana. Subsequently, in November Geiser purchased 441 head of cull cows from another Kiewit ranch, Pawnee Springs Ranch, at Maxwell, Nebraska. Geiser sold 196 head of these cattle to Glen for $27,534.60. Geiser was to pay for the Pawnee Ranch cattle on or before December 15, 1961, and on that date he issued his personal check in the amount of $62,899.80. At that time the balance in his bank account was $9.90. Geiser testified he told Glen he was in trouble, that he needed money to pay for the Kiewit

cattle, and on December 12, 1961, Glen gave him a check for $10,000. On the same date Glen paid him the balance on the 196 cows. On December 28, 1961, Geiser went to Glen at the sale barn and told him he needed additional money to cover the check for the Pawnee Springs cows, and received $9,500. Geiser still did not have sufficient funds, and on December 30, 1961, sold Beshaler 320 head of the cattle for $45,300. He then arranged for payment of the check.

Glen testified that when Geiser contacted him in December, he advised him that he had 238 head of steers on feed in Kansas and would need money to take care of the feed bill and the transportation costs, and Glen gave him a check for $10,000, drawn on a special account designated "B & G Feed Yard," which was a special account maintained by Ben and Glen Helberg. On December 29, 1961, Glen advanced Geiser an additional $9,500 by a check on the same account, making a total advance of $19,500, which Glen testified he believed was being advanced to pay for feed and transportation of the Kansas cattle.

When the cattle were sold on January 23, 1962, they produced a gross amount of $32,677.80, and Glen deducted the $19,500 due from Geiser and issued a check payable to Bud Beshaler and Paul Geiser, drawn on the Western Livestock Auction Company account, in the amount of $12,411.36. Glen further testified that a copy of the invoice and the check were duly mailed to Beshaler and should have been received by him on January 24th or 25th, 1962. The petition herein was filed August 12, 1964. Glen testified that he did not hear anything from Beshaler relative to the deduction for at least 18 months. The check was cashed February 27, 1962.

Beshaler testified that he attended the sale on January 23, 1962, but left before the sale was over. He received the invoice and the check referred to above by mail. He then called Glen and asked why $19,500 was deducted. Glen told him of the money he had advanced

to Geiser. He also told him that Geiser was on a big buying trip in Texas and would be gone for about 30 days. Upon Geiser's return, Beshaler contacted him and arranged for a meeting with Glen about February 23rd. It is Beshaler's testimony that at this meeting Glen said Beshaler should be paid his money, and as soon as he could arrange it with his father he would take care of it. Beshaler explained to Glen that he did need some money, and Glen told him to cash the check and they would straighten it out later. Beshaler talked to Glen approximately 3 weeks later about getting his money, and Glen said he was having a problem with his father understanding why the deal was like it was, and he needed additional time to get it ironed out. Beshaler testified that he contacted Glen at least once a month thereafter for 6 or 8 months.

Beshaler testified Geiser did not own any of the calves that were sold; that he did not authorize Helberg to withhold the $19,500; that he at no time authorized Geiser to borrow money on the calves; and that he never at any time made any representations to Helberg that Geiser was his partner, nor had Glen at any time talked to him about whether Geiser was his partner.

Geiser, who at one time had been employed by the Helbergs, testified that the $19,500 he borrowed from Glen had no connection with the Kansas cattle. Beshaler was the sole owner of those cattle. He had sold them for Kiewit to Beshaler. His only interest in the cattle was that he was to pay the trucking and feed bill for a share of the profits. He was to get half of the difference between the purchase and the sale price. He had never been in any partnership with Beshaler.

Defendants set out 16 assignments of error but argue only 7 of them. We consider only those which could be remotely prejudicial. The evidence is fairly conclusive that defendants failed to sustain their claim of a partnership. In any event, all possible issues were submitted to the jury which is the sole judge of the credibility of

witnesses and the weight to be given their testimony. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291.

Defendants' principal contention is that the trial court should have directed a verdict against Beshaler because he changed his testimony without reasonable explanation on a vital issue between the time of the trial and the taking of a deposition 5 years before. To have done so in this instance would have been erroneous.

We have held that if plaintiff, without reasonable explanation, testifies to facts materially different from his deposition concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is to be discredited and should be disregarded. Sacca v. Marshall, 180 Neb. 855, 146 N. W. 2d 375.

The principal point in question is whether Beshaler called Glen immediately upon the receipt of the check and invoice as he testified at the trial, or whether he got in touch with him within 30 days thereafter as indicated by the deposition. While the testimony raises a question of credibility, it is not within the rule set out above. Glen testified that Beshaler did not talk to him until at least 18 months after the check had been cashed. The evidence would support a reasonable deduction that whether Beshaler talked to Glen immediately or within 30 days, he did talk to him before the check was cashed. The issue was undoubtedly argued to the jury, and it is evident that it accepted Beshaler's version of the transaction.

Defendants complain that instruction No. 6 given by the court laid down inconsistent and confusing propositions to be considered by the jury. We assume they refer to instruction No. 3 because instruction No. 6 was not covered in defendants' assignments of error, and their

argument appears to be directed to that instruction.

The trial court submitted the instructions to the attorneys before they were given. Defendants, although they did object to some instructions, made no objections to either No. 3 or No. 6. In any event, instruction No. 3 is not misleading, erroneous, or prejudicial. Therein the court covered defendants' defenses of partnership, partnership by estoppel, accord and satisfaction, and estoppel. The court set out the specific elements necessary to be proved to establish any of the four defenses. It is defendants' position that the language in the instruction is in conflict but we do not so consider it. When the instruction is read in its entirety, we do not feel that the jury could have been misled by it.

Defendants assign as error the failure to give a tendered instruction to the effect that Paul Geiser had been convicted of a felony and that this evidence was made known to the jury so it could judge his credibility. The following appears in evidence in the testimony of Mr. Geiser: "Q Mr Geiser, this deposition is being taken at the Nebraska Penal and Correctional Complex, where you are presently an inmate. Were you convicted of a felony? A Yes. Q And out of what county, Mr. Geiser? A Cherry County. Q What was the date of your conviction? A October 5, 1966." The testimony therefore clearly indicated that the witness was a convicted felon.

Instruction No. 10 given by the trial court on this point was as follows: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider: * * * 8. Evidence of previous conviction of a felony; * * *." There is no merit to defendants' assignment.

Beshaler cross-appealed from the disallowance of an attorneys' fee herein under section 44-359, R. R. S. 1943, which provides as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action

at law upon any policy of life, accident, liability, sickness, guaranty, fidelity, or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

The bond issued by the defendant, National Surety Corporation of New York, provides in part as follows: "KNOW ALL MEN BY THESE PRESENTS: That we Ben J. Helberg and Glen Helberg d/b/a Platte Valley Sales Co. and Western Livestock Auction Company of North Platte, Nebraska, as Principal and NATIONAL SURETY CORPORATION OF NEW YORK, NEW YORK, as Surety are held and firmly bound unto Lester Langford of North Platte, Nebraska (or his successor in official position if any) as trustee for all persons who may be damaged through the breach of this bond, as obligee, in the sum of sixty-four thousand and no/100 Dollars * * *."

One of the conditions of the bond is as follows: "NOW THEREFORE, THE CONDITION OF THIS BOND IS SUCH THAT—1. If the said Principal shall safely keep and faithfully and promptly account for and pay to the owners or their duly authorized agents the proceeds of sales of all livestock received for sale on a commission basis by said Principal at a public stockyards, as defined in the Act of Congress known as the Packers and Stockyards Act, 1921, as amended; * * *."

Defendants argue that plaintiff, having failed to plead or prove any claim for attorneys' fees, is now barred, and cite two Nebraska cases in support thereof. Those cases give no comfort to the defendants. The first is Lawler v. American Surety Co., 101 Neb. 741, 164 N. W.

1050, in which it was held that plaintiff at a subsequent term of court could not have a retaxation of costs so as to award him an attorneys' fee. Judgment was rendered on October 6, 1915. Two days later plaintiff filed an application for the allowance of attorneys' fees. This was overruled, and the term at which the judgment was entered adjourned sine die October 30, 1915. Subsequently, the defendant paid the full amount of the judgment and costs into court. Plaintiff received and receipted for the same. On December 8, plaintiff filed another motion to retax costs, which was overruled, and plaintiff then perfected an appeal. It is obvious that plaintiff's failure to appeal from the overruling of his first motion for the allowance of attorneys' fees made that issue res judicata.

The other case cited by defendants is Haley v. Fleming, 148 Neb. 407, 27 N. W. 2d 626, which involved a construction of section 25-1801, R. S. 1943, and is not in point herein. That case reached this court on a motion to dismiss, and there was no evidence of any nature as to the pleadings or evidence to show the existence of the conditions precedent to an allowance of an attorneys' fee under that statute.

Defendants are in error in suggesting that there are no Nebraska cases exactly in point. Luikart v. Flannigan, 130 Neb. 901, 267 N. W. 165, would appear to indicate otherwise. In that case the defendants argued that the record was defective in that the petition did not contain a claim for an attorney's fee; it was allowed at a subsequent term of court and not " 'upon rendering judgment' " as required by statute; and there is no evidence of the value of the services performed by counsel for plaintiff. The court brushed these objections aside with the following language: "A claim for an attorney's fee after judgment in favor of plaintiff in an action on a fidelity policy or bond may be presented by motion at a subsequent term of court—the course taken herein. Allen v. Tallon, 120 Neb. 611, 234 N. W. 411."

Finding no prejudicial error, the judgment is affirmed except for the disallowance of an attorneys' fee, and the case is remanded to the district court for the allowance of an attorneys' fee for services in that court. Plaintiff is allowed an attorneys' fee of $500 for services rendered in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT EUGENE WHITED, APPELLANT.
193 N. W. 2d 268

Filed December 23, 1971. No. 38063.

1. **Post Conviction: Constitutional Law.** In the absence of a violation or infringement of a constitutional right, no relief may be had under the Post Conviction Act.
2. **Right to Counsel: Criminal Law.** The rule pronounced in Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387, that it is necessary to supply an indigent defendant with a lawyer at his preliminary hearing is not retroactive.
3. **Trial: Evidence: Criminal Law.** The rule announced in United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, that an in-court identification is inadmissible if tainted by an improper prior lineup or confrontation is not retroactive.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Robert Eugene Whited, pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant appeals from a denial of his request for post conviction relief. As grounds for relief, he states: (1) A lawyer should have been appointed for him at the

time of his arraignment in municipal court; (2) he was wrongfully confronted with an identifying witness immediately after the offense was committed; (3) the police failed to immediately check a purported alibi; and (4) the court erred in admitting leading questions and hearsay evidence. We affirm the judgment of the district court.

Defendant appealed from his original conviction. See State v. Whited, 182 Neb. 282, 154 N. W. 2d 508. Assignments (3) and (4) do not involve violations of constitutional rights. In the absence of a violation or infringement of a constitutional right, no relief may be had under the Post Conviction Act. See State v. Reizenstein, 183 Neb. 376, 160 N. W. 2d 208.

Defendant was arrested on September 14, 1966, was arraigned and waived preliminary hearing on September 16, 1966, and was released on bond on September 29, 1966. Counsel was appointed on October 6, 1966; poverty affidavit was filed and trial commenced on January 4, 1967; verdict was returned January 5, 1967; and sentence was pronounced January 19, 1967. The proposition that he was entitled to a lawyer at the time of his arraignment must be based upon Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387, decided June 22, 1970. Defendant cites Hamilton v. Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114. That case referred solely to proceedings in the State of Alabama, and the law of that state differed materially from that of Nebraska. The case is not pertinent. No poverty affidavit was filed nor does the record reflect a request for appointment of an attorney at the arraignment and waiving of preliminary hearing. Defendant, who was not inexperienced in such matters, having had five previous felony convictions, waived preliminary hearing. The case of Coleman v. Alabama, *supra*, does not have retroactive application. See, United States ex rel. Walker v. Maroney, 444 F. 2d 47 (3d Cir., 1971); Harris v. Neil, 437 F. 2d 63 (6th Cir., 1971); Vizzard v. Procunier, 439 F. 2d 94 (9th Cir.,

1971); Phillips v. North Carolina, 433 F. 2d 659 (4th Cir., 1970); Konvalin v. Sigler, 431 F. 2d 1156 (8th Cir., 1970); United States ex rel. Bonner v. Pate, 430 F. 2d 639 (7th Cir., 1970). The only contrary holding by the circuit courts we have found is in Rivera Escute v. Delgado, 439 F. 2d 891 (1st Cir., 1971).

The alleged improper confrontation is based upon United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, decided June 12, 1967. The evidence does not indicate that it tainted the in-court identification. The witness had opportunity to view defendant at the scene of the offense and gave an accurate description of him to officers. His identification was not dependent upon the confrontation after arrest. In any event, Wade is not retroactive. See Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OPHELIA BOHANNON, ALSO KNOWN AS OPHELIA JONES, APPELLANT.

193 N. W. 2d 153

Filed December 23, 1971. No. 38066.

1. **Criminal Law: False Pretenses: Fraud and Deceit.** The gist of the offense of obtaining money by false pretenses is the obtaining of the money of another by false pretenses, with the intent to cheat and defraud.
2. ———: ———: ———. To sustain a charge of obtaining money by false pretenses, there must be reliance upon the representations made, and the pretense must be an effective cause in inducing the owner to part with his property. However, it need not be the sole moving cause.
3. ———: ———: ———. If the owner has knowledge of the truth, the offense of obtaining property by false pretenses has not been committed.
4. **Criminal Law: False Pretenses: Fraud and Deceit: Evidence:**

Trial. The intent to cheat and defraud may be proved by the circumstances surrounding the transaction.

5. **Criminal Law: Witnesses: Evidence: Appeal and Error.** It is not the province of this court to determine the credibility of witnesses or weigh the evidence in a criminal case.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for obtaining money under false pretenses. The assignments of error relate to the sufficiency of the evidence to sustain the conviction.

The information charged that from July 1965 to December 1969, the defendant obtained money in excess of $35 from Douglas County, Nebraska, by false pretenses. The jury fixed the value of the money obtained at $3,000.

The evidence shows that defendant is the mother of 9 children and is divorced from William Bohannon, Sr. She applied for Aid to Dependent Children (ADC) in the early 1960's, and received a grant of $195 per month. In July 1967, the grant was increased to $344 per month. From July 1965 through December 1969, she received $13,654.50 in ADC funds.

Eligibility for a grant under the ADC program is determined in part by the resources of the recipient. A parent and 9 children are allowed a maximum of $1,700 in liquid assets under the plan in force in Nebraska. At 6-month intervals a recipient is required to furnish a written statement of assets to the welfare department. This statement is used by the department to determine

whether the recipient is eligible to continue to receive a grant under the program.

In 1965, the defendant moved into a house at 4416 North Thirty-eighth Street in Omaha, Nebraska. On July 7, 1965, the defendant, using the name of Ophelia M. Jones, had entered into a contract to purchase this property on an installment basis. The contract was recorded in November 1965. She represented to the welfare department that this property was owned by Clifford E. Jones and that she was renting it for $75 per month.

On April 29, 1966, the defendant opened a checking account in the Ames Plaza Bank, using the name of Ophelia M. Bohannon. On May 9, 1966, the account was changed to a joint account in the names of Clifford or Ophelia M. Jones.

On September 29, 1967, a certificate of title to a 1967 Cadillac automobile was issued to the defendant, using the name of Ophelia M. Jones.

In February 1968, the defendant, using the name of Ophelia Jones, entered into a contract with Clifford E. Jones for the purchase of a property at 2407 Ames Avenue where Jones operated a music shop known as Psychedelic Sounds. The contract was recorded in February 1968.

On July 23, 1969, a certificate of title to a 1966 Chevrolet automobile was issued to the defendant, using the name of Ophelia M. Jones.

The record contains 6 asset statements signed by the defendant dated October 18, 1965, August 26, 1966, March 15, 1967, September 20, 1967, January 30, 1969, and September 15, 1969. The checking account, the real estate, and the automobiles are not listed on any of these statements.

The defendant claims that she has no beneficial interest in any of the items which were omitted from the asset statements. She contends that the checking account, the real estate, and the automobiles are really the property of Clifford E. Jones and that Jones placed the

property in her name in an effort to avoid any claim by his divorced wife. Jones testified that he was the owner of the property in question.

The records of the welfare department show that on November 15, 1967, a neighbor complained that the defendant was "buying property, driving a 1968 Cadillac and living with a man." A caseworker called on the defendant to discuss the complaint. The defendant told the caseworker that Jones, her landlord, was "divorced and desires arrangements to keep his property from his ex-wife and children. Therefore, he wanted to place his new car and some property he had bought in her name." The caseworker advised the defendant "to have the name changed on this car registration and property." About 6 weeks later the department ascertained that a Cadillac automobile was registered under the name of Ophelia M. Jones. On February 8, 1968, the caseworker again visited the defendant and "emphasized the importance of Mr. Jones putting the car into his name."

Apparently, the department did nothing further until 1970 when the records in the courthouse were examined and it was ascertained that the Cadillac was still registered in the defendant's name and that she was a party to the contract to purchase the property on Ames Avenue. Her grant was then suspended as of January 1, 1970, and her case closed on April 1, 1970, "because of assets in excess of eligibility."

The gist of the offense is obtaining the money of another by false pretenses, with the intent to cheat and defraud. Dwoskin v. State, 161 Neb. 793, 74 N. W. 2d 847. The evidence of the State tended to prove that the defendant was the owner of the property omitted from the asset statements. The jury was not required to believe the testimony of the defendant and Jones that she had no beneficial interest in the property. It is not the province of this court to determine the credibility of witnesses or weigh the evidence in a criminal case.

An essential element of the offense is that there be re-

liance upon the representations made. Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653. The pretense must be an effective cause in inducing the owner to part with his property, and if the owner has knowledge of the truth, the offense has not been committed. However, the pretense need not be the sole moving cause that induced the owner to part with his property. Wax v. State, 43 Neb. 18, 61 N. W. 117.

To the extent that the welfare department had knowledge of the defendant's ownership of property omitted from the asset statements there was no reliance on the asset statements. The record does not show that the welfare department had any information concerning the checking account, the property on Ames Avenue, or the 1966 Chevrolet automobile until after December 1969. As to these items the jury could find that the welfare department relied upon the asset statements.

The defendant contends that the evidence is insufficient to establish an intent to cheat and defraud the county. The intent to cheat and defraud may be proved by the circumstances surrounding the transaction. State v. Swanson, 179 Neb. 693, 140 N. W. 2d 618.

The defendant argues that she did not want to have the grant continued; that it was reinstated in 1969 without any request from her after a 3-month suspension; and that she did not appeal from the action of the department in closing her case in 1970. The record shows that the defendant could have terminated the grant at any time by a written request to the department. If the defendant did not want the money, she could have returned the checks instead of cashing them. The fact that she did not comply with the advice of the caseworker in regard to the Cadillac automobile and the property on Thirty-eighth Street was a circumstance to be considered by the jury in determining her intent.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent.

This court has held in a large number of cases, one of which is Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653, that an essential element of the crime of obtaining money by false pretenses is reliance by the defrauded party upon the alleged false representation. In the cited case this court approved a statement from other Nebraska cases as follows: " 'It is not sufficient that there is a false pretense; *the owner of the property must rely on it;* the pretense must be *an effective cause in inducing* the owner to part with his property. Therefore, if the owner has knowledge of the truth or does not believe the pretense, or, although believing it, yet parts with the property on some other inducement, or investigates it and parts with the property, relying entirely on the results of his investigation, the offense has not been committed.' " (Emphasis supplied.)

The record in this case clearly discloses, I think, as a matter of law that (1) the information contained in the official records of the welfare department shows that at the time the payments were made the welfare department did not (and as a matter of law could not) rely upon the alleged misrepresentations contained in the asset statements because the department had knowledge of the facts which the State now claims were fraudulently concealed, and (2) the evidence in this case does not show Mrs. Bohannon had assets (including those originating with Jones) which made her children ineligible for ADC payments. Any failure to disclose facts which, if known, would not have made her ineligible to receive the payments on behalf of her children is legally immaterial because the existence of such facts could not be the basis of denial of aid. As a consequence such nondisclosure, whether deliberate or through misunderstanding, could not be an *effective cause* in inducing the payments because if known they would not have been lawful grounds for denying payment.

As to the facts of reliance the State itself introduced into evidence reports of the caseworkers whose duty it was to supervise the Bohannon case. As the majority opinion points out, on December 6, 1967, the caseworker investigated a complaint that Mrs. Bohannon was driving a Cadillac and buying property. The caseworker's report under date of December 6, 1967, shows: "Mrs. B. explained that the man with whom she has been going is divorced and desires arrangements to keep his property from his ex-wife and children. Therefore, *he wanted to place his new car and some property he had bought in her name.* Also, Mrs. B. stated that this man is the landlord of her house and does occasionally visit but never lives with her. Caseworker advised her that this was not an acceptable situation. Mrs. B. stated that this man had asked her to marry him; however, she is not certain what her decision will be. *Caseworker advised her to have the name changed* on this car registration and property." (Emphasis supplied.)

A report of another caseworker under date of January 30, 1969, is as follows: "Mrs. B's. home is in good condition and quite large. The furniture and interior decoration job in the living room is in excellent taste. The room is panelled in dark wood and furnishings and walls are done in reds and burnt oranges. This home hardly compares with any other ADC families. This lavishness is due to the fact that Mrs. B. has a rich boy friend. He leaves one of his cars, a grey and black 1968 Eldorado Cadillac with Mrs. B. to let her drive. He has a business of his own on 24th Street. *Mr. Jones wants to have everything in Mrs. B's. name. The reasons for this are not established.* Mrs. B. *rents the house from* Mr. Jones at only $75, and *he pays the utilities and buys her extras when needed.*" (Emphasis supplied.) A similar report under date of April 1, 1969, shows: "At Mrs. Bohannon's request a home visit was made this date. Mrs. Bohannon finally admitted that Mr. Jones and her were not really married in St. Paul as she had reported.

Mrs. B. reported that Mr. Jones only wants every one, his mother, their friends, plus the Welfare Department to think that he is married to Mrs. B. It seems that Mrs. B. handles his business affairs. *By having everything he owns in Mrs. B's. name* he feels that his ex-wife cannot claim anything for herself." (Emphasis supplied.) The majority opinion itself shows Mrs. Bohannon made no attempt at concealment. The contracts of purchase were recorded immediately in each instance. The welfare department knew at least as early as January 28, 1968, that she was using the name of Ophelia Jones.

The above clearly discloses the welfare department knew that property alleged to have originated with Jones was in fact in Mrs. Bohannon's name and that it was in fact being used to "pay utilities and buy her extras when needed."

The welfare department continued making ADC payments despite the knowledge it had. The record establishes as a matter of law that the welfare department did not rely upon the asset statements of August 26, 1966, March 15, 1967, September 20, 1967, January 30, 1969, and September 15, 1969, because it had actual knowledge they were not correct.

This set of facts cannot be distinguished from the Beyl case which we have cited. In that case the defendant was charged with obtaining money by false pretenses from a grain buyer. The scale operator at the elevator discovered the falsity of the representations prior to delivery of the check for the grain which was involved in connection with the falsity, but he delivered the check anyway. The court held the crime was not committed.

Introduced into evidence were certain regulations of the State Department of Welfare. These regulations include the following: *"MAXIMUM AVAILABLE RESOURCES:* An ADC unit need not be entirely without resources to be eligible for assistance. A moderate amount of cash, insurance, or other resources on which

the child or family may draw in case of emergency or other acute need may contribute measurably to family security and stability. The standards below are applicable to determining eligibility on the basis of available resources:

Unit without parents, one child	$ 750
Unit without parents, two children	$1500
Unit with one parent and one child	$1500
For each additional child or parent add	$ 25

. . .

"*DETERMINATION OF OWNERSHIP OF RESOURCES:* Property which appears on record in the name of an ADC unit must be considered his. Ownership of real estate may be determined through documentary sources. Records in the office of the register of deeds or office of the county clerk will show in whose name the property is recorded. Information in regard to estates which have not been settled or which are in probate may be secured through the records of the county court. *In case of joint ownership, the terms on which the property is held will need to be verified.* If the property has come to the holder as a part of an estate, the records of the county court are consulted; if by joint purchase, the facts will appear in the record of the deed. *Jointly owned personal property in some instances may be liquidated by any one of the holders.*" (Emphasis supplied.) The regulations also exempt from the definition of available resources certain items and these include the following: "(a) real property which the unit occupies as a home; (b) household goods of moderate value used in the home; . . . (d) resources to a maximum value of $3,000 used by the unit in a planned effort directed toward self-support; . . .." The regulation which defines available resources also provides: "The worth of resources, both available and exempt, is determined on the basis of their *current market value.*" (Emphasis supplied.)

This brings us to the second reason why the record

will not support a conviction. There is no evidence in the record that on any of the asset statements dates upon which statements the State relies for the false pretense the defendant had "assets available" in excess of those allowed by the regulations. The home itself is an exempt asset and need not be considered. As to the Cadillac and business property which was being purchased under contract, the record discloses only equities existed, and there is no evidence in the record to show the market value of these equities and what they could be converted into for cash. As to the bank account which was involved, the balances therein on the date of the asset statements are as follows: August 26, 1966, $156.57; March 15, 1967, $308.48; September 20, 1967, $658.66; January 30, 1969, $285.33; and September 15, 1969, $151.21.

As noted from the Beyl and other cases, one of the elements of the crime is that the alleged representations must be "an effective cause" of the defrauded party parting with the money or property. Any immaterial representation therefore, that is, one which would not affect eligibility, could not be an effective cause within the foregoing definition. We must keep in mind here that we are not dealing with the case of a private individual being allegedly defrauded. We are here dealing with a case in which the party was legally entitled to the funds if she was eligible. I take it no one would deny that under the equal protection clauses of the Constitutions of the United States and State of Nebraska if a person is eligible for ADC he cannot be deprived thereof. This is certainly at least implicit in the opinions of the Supreme Court of the United States. Lewis v. Martin, 397 U. S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561; King v. Smith, 392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118.

The record is wholly devoid of any evidence to show that Mrs. Bohannon had "available resources" in excess of the $1,700 which she was allowed by the regulations. Assuming that Mrs. Bohannon was legally free to liquidate the jointly owned property (which she was not),

there was no attempt by the State to prove the market value of the equities and that they exceeded the $1,700 available resources allowed. There is nothing whatever to show the music shop property is not an exempt property within the regulations of the welfare department.

We point out that on two occasions Mrs. Bohannon was suspended from welfare. On the last such occasion it was because of her representation she was married to Jones. When the welfare department found out this was not true, it put her back on without any request of her own. Apparently on the earlier occasion she was put back on without any request of her own. All these things fortify a conclusion there was no reliance. Section 43-512, R. R. S. 1943, places upon the county board of public welfare the obligation through its agents and employees to make an investigation of the allegations of any application. The welfare department is not entitled to rely upon the asset statements alone and disregard all the other information in its files furnished to it by the applicant.

An essential element of a jury verdict in these cases is a finding as to the amount of which the party was defrauded. In this particular case the jury found $3,000 although, as the majority opinion recites, she received after July 1965, $13,654.50. There is absolutely no rational way to tell from the evidence how the jury could arrive at such a figure. This again, to my mind, demonstrates that the jury verdict was the result of confusion and misunderstanding.

I would reverse the conviction for the reason the evidence is legally insufficient: (1) Because it shows as a matter of law that there was not and could not be any reliance upon the alleged false representations, and (2) because the record in this case fails to establish that the representations were material and could justify the withholding of the payments. It therefore fails to establish that any misrepresentations could be a legally effective cause of the payments.

STATE OF NEBRASKA, APPELLEE, V. GENE LYNN ANDERSEN, APPELLANT.

193 N. W. 2d 159

Filed December 23, 1971. No. 38148.

Criminal Law: Sentences: Appeal and Error. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Cecil W. Orton, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

The only issue raised in this appeal from a guilty plea to the crime of burglary is the excessiveness of the sentence. Defendant Gene Lynn Andersen was sentenced to a term of not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex, and was given credit for the time spent in the county jail awaiting trial and sentence. We affirm.

Defendant, who was 24 years of age, with two accomplices broke into a store at night at Wynot, Nebraska. It is defendant's contention that the sentence was excessive in view of defendant's age; the fact that he was merely a follower with two more experienced participants; and that he had cooperated with the State in entering a plea of guilty.

From a review of the presentence investigation, which is a part of the record, we are convinced that the trial court did extend leniency to the defendant, and that the sentence is a minimal one. Defendant was sent to the

Boys' Training School at 14, where he spent 14 months for burglary. In 1964 he was apprehended for petit larceny and given a year's probation. In 1969 he was involved in a burglary in South Dakota but no charges were filed because he was in custody in Montana on a similar charge. On the Montana offense sentence was suspended and he was placed on 2-years' probation. He was still on probation when the current offense, which carries a fine, jail up to 6 months, or a 1 to 10 year imprisonment penalty (section 28-532, R. R. S. 1943), was committed. Considering defendant's previous involvement, no abuse of discretion is disclosed by the record.

We have said on previous occasions: "Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion." State v. Lenz, 183 Neb. 496, 161 N. W. 2d 710.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

LAWRENCE F. WEBER, ADMINISTRATOR OF THE ESTATE OF MARIE E. HICKMAN, DECEASED, APPELLANT, V. SOUTHWEST NEBRASKA DAIRY SUPPLIERS, INC., A CORPORATION, ET AL., APPELLEES.

193 N. W. 2d 274

Filed December 30, 1971. No. 37895.

1. **Automobiles: Negligence: Statutes: Highways.** Section 39-751, R. S. Supp., 1969, is intended to avoid collisions between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way as explained therein is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way.

2. **Automobiles: Negligence: Highways.** The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law.
3. **Automobiles: Negligence: Trial: Jury.** Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct the operation of the automobile and to exercise control over it. This ordinarily is a question for a jury, unless the evidence is so conclusive that the minds of men could not reasonably arrive at any other conclusion, then the question is one for decision by the court as a matter of law.
4. **Evidence: Negligence: Trial: Husband and Wife: Death.** Where the evidence is clear that the only person within the class for which an action may be brought under section 30-810, R. R. S. 1943, is guilty of negligence as a matter of law, it is the duty of the court to direct a verdict for the defendant.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Mitchell & Beatty, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an appeal by Lawrence F. Weber, administrator of the estate of Marie E. Hickman, deceased, plaintiff, from the dismissal at the close of the plaintiff's evidence of a wrongful death action against Southwest Nebraska Dairy Suppliers, Inc., a corporation, and Milford Johnson, defendants. The trial court determined the driver of the plaintiff's vehicle was negligent as a matter of law; that such negligence was imputed to Robert N. Hickman and the deceased, Marie E. Hickman, his wife; and that Robert N. Hickman was a widower and the only heir of Marie E. Hickman who

sustained pecuniary loss under section 30-810, R. R. S. 1943. We reverse.

This action involves a collision on July 23, 1969, at approximately 9:30 a.m., between a pickup truck jointly owned by the deceased and Robert N. Hickman, and a truck owned by Southwest Nebraska Dairy Suppliers, Inc., and operated by Milford Johnson, in the approximate center of an open intersection of two graveled roads 2½ miles west and 4/10 of a mile north of Elm Creek, Nebraska. Johnson, hereinafter referred to as defendant, was traveling north and the Hickman vehicle operated by Mrs. Audrey Grassmeyer, a family friend, was traveling east. Defendant had the directional right-of-way.

The Hickman pickup was partly loaded with corn which Mr. Hickman was going to feed to cattle on his pasture 1 mile east and 8 miles north of the intersection. Hickman had found chokecherries in this pasture and the evening before his wife and Mrs. Grassmeyer had decided to ride with him so they could pick the chokecherries. When they were ready to leave the Hickman farm home, Mrs. Grassmeyer was standing on the driver's side of the pickup, which she had driven before. Mr. Hickman told her, "* * * go ahead and I will open the gates." Mrs. Grassmeyer had been to the pasture before. She got into the driver's seat with Mrs. Hickman in the middle and Mr. Hickman on the other side. As they turned east on the gravel road to the north of the farm and approached the intersection, Mr. Hickman noticed some calves strung out along the fence and told Mrs. Grassmeyer "* * * just drive slow and I will count these calves." Mrs. Grassmeyer drove slowly approaching the intersection and at Hickman's request stopped the pickup about a car length west of the corner post in the southwest corner of the intersection so he could count the calves bunched in the corner. After he had counted the calves he said "* * * they are all there." He then leaned over to move some tools on the floor under

his feet. The pickup started forward slowly; the brakes were applied; and the next thing he remembered was waking up in the hospital. The evidence would indicate that the Hickman pickup hit the left front side of the defendant's vehicle.

The decedent had been employed as a school teacher for 5 years. In addition to her teaching duties, she generally helped with the farm chores such as feeding and milking cattle, stacking hay, and buying supplies for the farm. She transacted 95 percent of the financial business of the farm; did the paperwork; filled out tax returns; and helped in the purchase of cattle. The income from her teaching job was deposited in a joint banking account and was used for paying farm expenses. The Hickmans employed no farm help.

The intersection was an open one. From the evidence and the photographs in evidence, both parties could see approaching vehicles for at least 250 feet from the intersection. The plaintiff's evidence would indicate that the defendant was negligent in not maintaining a proper lookout. The primary questions, however, are whether or not the driver of the Hickman vehicle was negligent as a matter of law, and if so whether or not her negligence could be imputed to Robert N. Hickman.

Without regard to defendant's possible negligence, we find that Mrs. Grassmeyer was guilty of negligence more than slight as a matter of law. Under ordinary circumstances, the defendant's vehicle would have the directional right-of-way. Plaintiff produced no evidence that would negative this directional right-of-way. Except for the extensive damage to the vehicles, there is no indication of the speed of the respective vehicles. If Mrs. Grassmeyer had looked before starting up, or at any time before entering the intersection, she would have seen the approaching vehicle. The photographs in evidence would indicate that the right front of the Hickman vehicle struck the left door of defendant's vehicle. At the time of impact the front of defendant's vehicle had

started across the center of the intersection.

We said in Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496: The statute (now § 39-751, R. S. Supp., 1969) is intended to avoid collisions between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way as explained therein is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way.

In Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36, we said: "The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law."

Was the negligence of Mrs. Grassmeyer imputed to Robert N. Hickman? We hold that whether it was or not is a jury question.

The facts indicate Mrs. Grassmeyer was driving because Hickman asked her to so he could open some gates which were hard to open. It is undisputed that Hickman, a joint owner of the vehicle, directed Mrs. Grassmeyer to drive slowly so he could count the calves along the fence, and then had her stop approximately two car lengths from the intersection until he could count the calves bunched in the corner. After he indicated he had counted the calves he said they were all there. Mrs. Grassmeyer then accelerated the vehicle and immediately thereafter collided with the defendant's vehicle.

The rule in this state is: "Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is not imputable to the owner, except where the operator is the

owner's servant or agent, or where the operator and the owner are engaged in a joint enterprise, or where the owner assumes to direct the operation of the automobile and to exercise control over it." Petersen v. Schneider, 154 Neb. 303, 47 N. W. 2d 863.

In Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107, we held that where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct the operation of the automobile and to exercise control over it. This is ordinarily a question for a jury, unless the evidence is so conclusive that the minds of men could not reasonably arrive at any other conclusion, then the question is one for decision by the court as a matter of law. That is not the situation herein, and the defendant's motion to dismiss should not have been sustained.

This action is brought by an administrator under section 30-810, R. R. S. 1943, for the exclusive benefit of Robert N. Hickman, the widower and next of kin. The evidence is undisputed that Robert N. Hickman is the sole and only person sustaining pecuniary loss in the death of his wife. We have heretofore held in an action by a plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for the defendant. Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

We fail to perceive any distinction between a situation where the action is brought by a personal representative other than the beneficiary and one where the beneficiary himself is the plaintiff, if in both situations he is the sole and only person who can be benefited by the action and is guilty of negligence as a matter of law. If the

jury should find that the negligence of Mrs. Grassmeyer is imputable to Robert N. Hickman, then there could be no recovery herein.

Where the evidence is clear that the only person within the class for which an action may be brought under section 30-810, R. R. S. 1943, is guilty of negligence as a matter of law, it is the duty of the court to direct a verdict for defendant.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McCOWN, J., concurring in result only.

Where the evidence is inconclusive as to whether or not the owner is directing or controlling the operation of the automobile, the question is for the jury. See Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

On the facts here, it seems apparent that Robert N. Hickman's conduct as a matter of law did not amount to direction and control of the operation of the car at the time the accident actually occurred. He had finished the task for which he had requested Mrs. Grassmeyer to drive slowly and stop. When he had counted the calves, he said: "They are all there" and then leaned over and began to move some tools under his feet. From that point on, he was only a passenger. Even if his conduct should be held to constitute an exercise of control or the temporary assumption of the operation of the automobile, that control of operation was clearly over before Mrs. Grassmeyer began to drive the automobile again. If a request to drive slowly or to stop for a few moments at a designated location constitutes assuming control and directing the operation of an automobile, then virtually any statement which includes such a request would constitute not only an immediate assumption of control, but would also extend that control to the end of whatever journey the parties were taking, under the theories advanced by the majority opinion. This is neither logical nor reasonable. A request by an owner

passenger for a stop to permit him to get a newspaper at the start of a journey would then raise a jury issue as to whether any negligence of the driver coming after the request had been complied with should or should not be imputed to the owner. Even a stop request necessitated by an owner's urgent need for service station facilities would raise a jury question as to assumption of control of the automobile thereafter.

A more important problem here arises over the basic issue of imputation of negligence. The individual for whose death this action was brought apparently took no action, and did not even utter a word from the time the journey began. Yet it is left to the jury to determine whether or not her husband's requests to the driver made the negligence of the driver imputable to him, and then, because the husband is the sole beneficiary, barred him from any recovery against the defendant for her death.

The doctrine of imputed contributory negligence, which developed largely in the latter part of the Nineteenth Century, was based on theories of fictitious agency relationships. It is now generally recognized that such theories of agency are entirely fictitious and the doctrine of imputed contributory negligence has been largely discredited. See Restatement, Torts 2d, § 485, p. 541, et seq.

Section 485, Restatement, Torts 2d, states: "Except as stated in §§ 486, 491, and 494, a plaintiff is not barred from recovery by the negligent act or omission of a third person." Comment a under section 485 states: "The rule stated in this Section rejects, except as indicated by the reference to other Sections, the doctrine of 'imputed contributory negligence,' under which the plaintiff is barred from recovery against the defendant because the negligence of a third person, with whom the plaintiff stands in some relation, has contributed to his harm. * * *" Comment b outlines the exceptions referred to in section 485. These exceptions do not apply here. Comment c then states: "With these exceptions, the common law no longer imputes the negligence of a

third person to the plaintiff to bar his recovery for the harm he has suffered. even in situations where he would be liable for that negligence as a defendant in an action brought by a third person."

The major change in judicial position occurring between the First and Second Restatement is clearly reflected in section 485. There is a definite turn around as to imputed contributory negligence and the old "both-ways test." See, Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L. J. 831; 2 Harper and James, Law of Torts, c. 23, p. 1264; Prosser, (4th Ed.) Torts, § 72, p. 475; Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 144 N. W. 2d 540 (1966).

In addition to the fundamental imputed negligence problem, the majority opinion also applies the rule that under our death statute, where the sole beneficiary is guilty of negligence more than slight as a matter of law, it is the duty of the court to direct a verdict for the defendant. That rule in itself is quite correct, but the Nebraska cases cited, and indeed virtually all of the cases supporting the point, involve the personal negligence of the sole beneficiary. With that principle there can be little quarrel. However, the majority opinion assumes that a sole beneficiary is personally negligent whenever he is vicariously responsible for the negligence of the driver. This simply does not follow and it constitutes an even more obvious misapplication of the discredited imputed contributory negligence doctrine. The majority opinion on policy issues may be generated partially from the constricting provisions of the Nebraska Motor Vehicle Guest Act. Nevertheless, the opinion does not march to the beat of the modern judicial drum.

IN RE ESTATE OF AGNES V. PANTER, DECEASED. ROBERT WALLACE FLINT, APPELLANT, V. BYRON D. PANTER, EXECUTOR OF THE ESTATE OF AGNES V. PANTER, DECEASED, APPELLEE.

193 N. W. 2d 279

Filed December 30, 1971. No. 37977.

1. **Judgments: Fraud and Deceit: Negligence.** It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary. The petitioner must also show that the failure to obtain a just decision is not attributable to his own fault or negligence.
2. **Wills.** A codicil may alter, enlarge, or restrain the provisions of a will. Its distinguishing feature is that it is an addition to or qualification of a will.
3. **Wills: Estates: Notice.** Notice that a will and codicil are being offered for probate is sufficient to put a party receiving the notice upon inquiry to determine what documents are being offered for probate.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Affirmed.

Woods, Aitken, Smith, Greer, Overcash & Spangler, Richard L. Spangler, and Jack Craven, for appellant.

Gerald J. Hallstead, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

BOSLAUGH, J.

This is an appeal in an action to vacate a decree admitting a will to probate.

Agnes V. Panter died on July 13, 1967. She left surviving her Byron D. Panter, a son, and Robert Wallace Flint, a son of a deceased daughter. Her will dated January 26, 1966, and a codicil dated May 13, 1966, were admitted to probate in the county court of Saline County, Nebraska, on August 9, 1967. Byron D. Panter is the executor and the sole beneficiary under the will and codicil.

On November 4, 1968, after a petition for final settle-

ment had been filed by the executor, Robert Wallace Flint filed his petition in the county court to vacate the decree admitting the will and codicil to probate.

The petition to vacate alleged that the will and codicil were the result of undue influence practiced upon the deceased by Byron D. Panter; that Robert Wallace Flint, the petitioner, had been informed by the deceased, before she entered the hospital in 1965, that she had made a will leaving one-half of her estate to the petitioner and the other one-half to Byron D. Panter for life with the remainder to the petitioner; that the petitioner did not know about the will and codicil executed in 1966 until after they had been admitted to probate; that the petitioner "believed, and was lead (led) to believe" that the will being offered for probate was the previous will of the deceased; and that the petitioner was misled by the failure of Byron D. Panter and his attorney to inform the petitioner that the will and codicil being offered for probate had been executed by the deceased in 1966.

On February 3, 1969, the county court sustained a general demurrer to the petition to vacate and dismissed the proceedings. The petitioner filed a notice of appeal to the district court on February 13, 1969. A transcript from the county court was filed in the district court on February 28, 1969.

On July 28, 1969, Byron D. Panter moved to dismiss the appeal because of the failure of the petitioner to plead. This motion was overruled, and on August 12, 1969, the petitioner filed an "Answer to Petition for Final Settlement" which contained allegations similar to those contained in the petition to vacate filed in the county court. A general demurrer to the answer was sustained on September 14, 1970.

The record shows that the petition for probate was filed in the county court on July 19, 1967. On the same day the court ordered that the petition be heard on August 9, 1967, and that notice be given as required by law. A notice of hearing was published as required by

section 30-217, R. R. S. 1943. On July 22, 1967, the attorney for Byron D. Panter, the proponent, filed his affidavit in the county court stating that he had mailed a copy of the notice of hearing to the petitioner as required by section 25-520.01, R. R. S. 1943. The notice recited that the petition for probate of the *will and codicil* of the deceased would be heard on August 9, 1967. The petitioner does not contend that he did not receive a copy of the notice of hearing.

It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary. The petition must also show that the failure to obtain a just decision is not attributable to his own fault or negligence. Gleason v. Poore, 167 Neb. 312, 92 N. W. 2d 705; In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379; Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010.

The petitioner in this case had notice that, in addition to the will, a codicil was being offered for probate. This was notice that the will which was being offered for probate had been changed in some particular. The distinguishing feature of a codicil is that it is an addition to or a qualification of a will. Owens v. Doyle, 152 Conn. 199, 205 A. 2d 495, 11 A. L. R. 3d 1006. A codicil may alter, enlarge, or restrain the provisions of a will. 94 C. J. S., Wills, § 1b, p. 678.

The circumstances in this case were sufficient to put the petitioner on inquiry after receiving the notice of hearing. A person exercising due diligence would have made further inquiry to determine what was being offered for probate. In re Estate of Reikofski, *supra;* Miller v. Estate of Miller, *supra.*

The petitioner relies upon Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737, in which a petition to set aside a decree admitting a will to probate was held sufficient as against a demurrer. In the Johnson case the petition alleged that Richards had sent a copy of the will to the petitioners a few days before the hear-

ing and had advised them that it was in the process of being probated. The petitioners then wrote to Richards "immediately" requesting information as to the date of hearing. Richards did not answer the request. These circumstances were held to exempt the petitioners from a conclusion of negligence and an absence of diligence. There are no circumstances alleged in this case that show diligence on the part of petitioner.

The order of the district court sustaining the demurrer to the "answer" of the petitioner was correct. The judgment is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

KIRBY BAILEY, APPELLEE AND CROSS-APPELLANT, V. LEON MCCOY, APPELLANT AND CROSS-APPELLEE.
193 N. W. 2d 270

Filed December 30, 1971. No. 38000.

1. **Trial: Courts.** Special findings by the district court ordinarily are unnecessary unless a party requests them with a view of excepting to the decision of the court upon the question of law involved in the trial.
2. **Trial: Courts: Parties.** The district court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.
3. **Partnership.** A partnership may continue, although it admits a partner or a partner retires.
4. **Partnership: Contracts.** The agreement in many respects is the law of the partnership.
5. **Partnership: Contracts: Words and Phrases.** In a service partnership agreement with a provision that the partners base payment for good will on annual income, the word "income" ordinarily imports net profits.

Appeal from the district court for Antelope County: GEORGE W. DITTRICK, Judge. Affirmed as modified.

Kirby & Spittler, for appellant.

Thomas E. Brogan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Kirby Bailey sued Leon McCoy to wind up the affairs of a partnership formed to render accounting and income tax services. After a trial the district court rendered judgment of $3,062.42 in favor of Bailey. McCoy appeals and Bailey cross-appeals.

In the year 1966 Bailey, an Internal Revenue Service examining agent, was living at Norfolk. McCoy was conducting a combined income tax, accounting, insurance, and real estate business at Neligh. They entered into a written agreement of partnership in October 1966, to render income tax and accounting services at Neligh from January 1, 1967. Bailey and his family moved to Neligh.

Bailey and McCoy in the agreement adopted many provisions that a lawyer had drafted in an unrelated transaction between McCoy and a third party. The partnership would remain in existence until dissolution by mutual agreement or court action. McCoy sold Bailey one-half of McCoy's "interest" for $1. The partnership would pay $50 a month for rental of office space and equipment, and for utilities. The premises and all present office equipment would remain the property of McCoy.

Material ambiguities began in paragraph VII of the agreement: ". . . the value of the partnership is considered to be equal to the annual income therefrom."

Paragraph VIII of the agreement set out a procedure for sale of the undivided interest of either partner to the other. Sixty days' notification of the outgoing partner's desire to "terminate" the partnership was required. Should the parties not agree upon the price, appraisers

would set it. Prior to January 1, 1969, however, upon withdrawal of Bailey, the price payable by McCoy at his option would be $1. Should McCoy "not elect option to purchase other one-half, that in event of dissolution, that he will have the option to divide the customers equally between the two partners. This will in no way guarantee that either or both partners will retain all of the customers he acquires. It is agreed however, that neither will solicit those customers acquired by the other partner."

Succeeding paragraphs formed background of the present controversy. Under paragraph IX refusal of either party to pay the appraisal price conferred upon either one the right to a judicial dissolution of the partnership. Under paragraph X the partner departing or "forcing"" dissolution agreed not to solicit income tax or accounting business in Antelope County, in which Neligh, but not Norfolk, was located. The paragraph would be inoperative, should the parties divide the business.

In December 1967, Bailey and McCoy negotiated with Wayne E. Boone to form a three-man partnership. They orally agreed Boone would receive one-third of the net profits from January 1, 1968, but no interest in the business until January 1, 1970. The parties performed into the year 1969.

On May 5, 1969, Bailey submitted to McCoy and Boone a financial statement of that date. In the statement, Bailey admitted having overdrawn his account $1,647.50 in 1967 and $1,719.90 from January 1, 1968, to May 5, 1969. The federal partnership income tax return for 1968 set out an overdraft of Bailey in the sum of $2,605.24. In addition to those amounts Bailey admitted owing McCoy $584.84 on an unrelated insurance account. The parties agreed upon the last item and the amount of the 1967 overdraft.

On May 14, 1969, Bailey notified McCoy of Bailey's intention to retire July 15, the notification referring to

the 1966 agreement. Afterward McCoy retained all bank records and files of clients except a corporation and its majority stockholder. The corporation probably was employing Bailey at the time of trial in September 1969. McCoy and Boone were continuing all other business. No creditor's rights intruded.

The district court found generally for Bailey on his petition and for each party on right to an accounting. In rendering judgment, the court did not disclose how it computed the amount. Neither party requested special findings, and no one may rightly complain. Special findings ordinarily are unnecessary unless a party requests them with a view of excepting to the decision of the court upon the question of law involved in the trial. See § 25-1127, R. R. S. 1943.

McCoy argues that (1) the Bailey-McCoy partnership terminated December 31, 1967, and Bailey is indebted to McCoy on an account stated in the sum of $1,647.50, the amount of the overdraft in 1967; (2) settlement of those accounts barred Bailey's right to recover under paragraph VII of the written agreement; (3) the court erroneously debited Bailey's account in the sum of $584.84 on the insurance account which was unrelated to the partnership; and (4) McCoy was entitled to recover Bailey's overdraft of $2,605.24 set out in the partnership tax return for 1968.

Bailey on cross-appeal contends that (1) only one partnership existed; and (2) the word "income" in paragraph VII of the 1966 agreement meant gross income. He urges a right to recover $10,459.19, based on the year 1968, or $14,236.16 which equaled one-half of the gross income for the fractional year January 1 to May 5, 1969.

Agreement on the amount of the overdraft in 1967 did not rise to the dignity of a settlement that barred Bailey's right under paragraph VII of the 1966 agreement. The debit of $584.84 on the insurance account was indisputedly accurate. McCoy therefore complains of an unrelated debit without evidence of prejudice to him. He

is also entitled to debit Bailey's account only in the sum of $1,719.90 which apparently equaled the 1968 overdraft less a balance in favor of Bailey for 1969.

Two other problems stand out. One is whether Boone was an indispensable party. No one raised the question in district court. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in. § 25-323, R. R. S. 1943.

Boone was not an indispensable party, whether the number of partnerships was one or two. Prior to January 1, 1970, he possessed no interest in good will. He incurred no obligation and he possessed no right to contribute to the purchase of good will from a retiring partner. Lack of public notification of dissolution was not material here. We decide that a partnership may continue, although it admits a partner or a partner retires.

"Retirement is an obvious cause of dissolution not specified, although it may fall within one of the specific causes. Admission of a new partner is not specified as a cause although it is often said to be. The better view is that it is not.

". . . no dissolution occurs in a large partnership whose articles specify that there is no dissolution on death, retirement, incapacity, etc. Examples include accounting . . . firms with dozens or hundreds of partners, and frequent changes in membership. There is no reason why legal theory should not accept this practical result, and it has done so. And there is no reason to limit it to larger firms.

"The older view of inevitable dissolution depended on delectus personae and the non-transferability of interests in partnership. But both these roots are matters of partnership agreement and can be varied by agreement." Crane and Bromberg on Partnership, § 73, p. 417, n. 3,

and p. 418 (1968). See, also, Bromberg, "Partnership Dissolution - Causes, Consequences, and Cures," 43 Tex. L. Rev. 631 (1965).

The agreement in many respects is the law of the partnership. See, § 67-343, R. R. S. 1943; Uniform Partnership Act (U.L.A.), § 43 (1969); Crane and Bromberg on Partnership, § 5(b), p. 43 (1968); 1 Rowley on Partnerships, § 8.1, p. 196 (2d Ed., 1960); cf. Leighton v. Clarke, 42 Neb. 427, 60 N. W. 875 (1894). "It is time we recognize in this respect (changes of membership) . . . that the partnership is what the partners make it." Crane and Bromberg on Partnership, § 78A, p. 444 (1968).

The second problem is interpretation of the word "income" in paragraph VII of the Bailey-McCoy agreement. A partnership engaged in performing services may possess good will. Crane and Bromberg on Partnership, § 84(a), p. 480 (1968). Good will may or may not be of value when the business has been conducted at a loss. 1 Rowley, § 8.1, p. 196; 2 Rowley, § 47.0, p. 137. In a service partnership agreement with a provision that the partners base payment for good will on annual income, the word "income" ordinarily imports net profits.

Evidence concerning transactions unassailed on appeal is not clear. The positions of the parties and the record lead us to these findings and conclusions. The base year for calculation of the value of good will is 1968, not fractional 1969. The proportion is one-half, not one-third. Bailey's account ought to be credited and debited as follows:

Credit:	Good will		$7,942.14
Debits:			
	Overdraft in 1967	$1,647.50	
	Overdraft in 1968 less balance in 1969	1,719.90	
	Insurance account	584.84	3,952.24
	Balance		$3,989.90

We accordingly modify the judgment by increasing the amount to $3,989.90. So modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

J. W. AUTO PARTS, INC., A CORPORATION, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

193 N. W. 2d 281

Filed December 30, 1971. No. 38004.

Zoning: Municipal Corporations: Counties: Courts: Trial. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Robert H. Beach of Westering & Beach, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen L. Morrow, Jon B. Abbott, George B. Selders, Jr., Kent N. Whinnery, Verne W. Vance, and Thomas F. Dowd, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

WHITE, C. J.

The city council of Omaha and the district court, on appeal, denied the plaintiff a permit to operate an automobile salvage and used parts business on his property. The district court dismissed this suit for an injunction against the city. We affirm the judgment of the district court.

The only question presented is whether there was a rational basis for the city council's action. The regulat-

ing body has a wide discretion in the granting or denying of a permit and the record must show arbitrary and unreasonable action. Judicial review does not permit policy determinations. The record shows, inter alia, the following:

(1) Close proximity to residential areas at higher elevations (6 nearby and a residential area in the City of Ralston, 6 blocks away);

(2) Smoke and soot infiltrating the residential areas from fires deliberately set to burn out automobile interiors in the process of dismantling;

(3) One hundred and fifty cars stored or parked in various stages of dismantling on the back lot of plaintiff's premises;

(4) Used and dismantled parts stored and strewn about in disorder on the premises;

(5) Besides the smoke problem, the evidence is undisputed as to the general unsightliness of the plaintiff's operation;

(6) The deliberate burning of the wrecked cars in the dismantling process, with the consequent fire hazard, in a rapidly developing area already including many residences;

(7) Accidental fires resulting from the use of cutting torches in the dismantling process. They are not infrequent, three occurring between the time the temporary injunction was granted and the trial in the district court; and

(8) The hazard inherent in the attraction of the premises to small children and the increasing danger as the area develops.

The validity of the ordinance under which the council took action, or the power of the city to reasonably regulate the use in question, is not challenged.

Applicable here in principle is what we said in Graham v. Graybar Electric Co., Inc., 158 Neb. 527, 63 N. W. 2d 774: "What is the public good as it relates to zoning ordinances affecting the use of property is, pri-

marily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere." Of the same import are: City of Omaha v. Glissman, 151 Neb. 895, 39 N. W. 2d 828; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N. W. 376; Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634; Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835.

From what we have said it is clear that the city council and the district court did not abuse their discretion in refusing relief.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

J. I. CASE CREDIT CORPORATION, APPELLEE, V. HAROLD G. THOMPSON ET AL., APPELLANTS, IMPLEADED WITH THE BANK OF LINDSAY, APPELLEE.
193 N. W. 2d 283

Filed December 30, 1971. No. 38018.

Foreclosure: Mortgages: Property: Limitations of Actions: Statutes. An action to foreclose a real estate mortgage may be brought within the period of limitation provided by section 25-202, R. R. S. 1943, even though an action on the debt is barred.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

William G. Whitford, for appellants.

George H. Moyer, Sr., of Moyer & Moyer, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action to foreclose a real estate mortgage. The trial court found that the defendants, Harold G. Thompson and Dorothy Thompson, were indebted to the plaintiff in the amount of $4,801.94 with interest at 6 percent from October 5, 1961; that the plaintiff's mortgage was a first lien on the property for that amount; that a mortgage of The Bank of Lindsay was a second lien on the property; and that the plaintiff was entitled to a decree of foreclosure.

The defendants Thompson appeal, claiming that the judgment is erroneous because an action on their promissory note to the plaintiff was barred by section 25-205, R. R. S. 1943, at the time this action was commenced. The defendants rely upon Brainard v. Hall, 137 Neb. 491, 289 N. W. 845, and several earlier cases in which it was held that no action could be maintained upon a mortgage when an action on the debt was barred by the statute of limitations. See, Kyger v. Ryley, 2 Neb. 20; Hurley v. Estes, 6 Neb. 386.

Prior to 1869 there was no separate statute of limitations applicable to mortgages. In 1869, section 6 of the Code of Civil Procedure (now section 25-202, R. R. S. 1943), applicable to actions for the recovery of title or possession of land, was made applicable to mortgages. Laws 1869, § 1, p. 67. In Hale v. Christy, 8 Neb. 264, this court stated that the 10-year period of limitation prescribed by section 6 of the Code was applicable to actions for mortgage foreclosure. See, also, Hurley v. Cox, 9 Neb. 230, 2 N. W. 705, stating that the 5-year period of limitation, applicable to an action on the note, barred the mortgage foreclosure action prior to the 1869 amendment to section 6 of the Code.

The quotation from Hurley v. Estes, *supra*, to the effect that no action can be maintained on a mortgage after an action on the debt is barred, which appears in Brainard v. Hall, *supra*, was inadvertent. The rule has been to the contrary since the 1869 amendment to section

25-202, R. R. S. 1943. See, Cheney v. Cooper, 14 Neb. 415, 16 N. W. 471; Herdman v. Marshall, 17 Neb. 252, 22 N. W. 690; Cheney v. Woodruff, 20 Neb. 124, 29 N. W. 275; Cheney v. Campbell, 28 Neb. 376, 44 N. W. 451; Campbell v. Upton, 56 Neb. 385, 76 N. W. 910.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES P. STAPLETON, APPELLANT.
193 N. W. 2d 284

Filed December 30, 1971. No. 38104.

Criminal Law: Drugs, Narcotics, and Poisons: Guilty Plea. The fact that a defendant is a narcotics addict and experiencing some symptoms of withdrawal does not invalidate a plea of guilty where the record otherwise indicates that the plea was voluntary and entered intelligently and understandingly.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant pleaded guilty to unlawful possession of heroin and was sentenced to 2 years' imprisonment. The defendant appeals, claiming that his plea was invalid.

Apparently the offense was committed on March 1, 1971, while the defendant was in custody in Grand Island, Nebraska. The defendant contends that because he was a narcotics addict and received methadone for only "a few nights" while he was confined in the jail, he was

incapable of intelligently and understandingly entering a plea of guilty.

The defendant was arraigned in the district court on March 11, 1971. After being fully advised as to his rights, the defendant waived the right to counsel and entered a plea of guilty. The district judge inquired of the defendant specifically as to whether access to or denial of narcotic drugs had anything to do with his plea. The defendant answered that it did, partly; that he was guilty of having them; and that he was going through withdrawal. The judge then asked the defendant if he felt a compulsion in connection with his plea. The defendant answered: "No, not that I need to. I'm guilty. I didn't see any point laying around in jail." Later the county attorney asked the defendant if the fact that he had not had methadone for several days had any bearing on his waiver of counsel and plea of guilty. The defendant answered "No" and confirmed that he had stated to the county attorney that he did not want to do a lot of dead time.

The sentencing hearing was held on the following day, March 12, 1971. The district judge asked the defendant if there was any reason why he would like to withdraw his plea of guilty and the defendant answered, "No, sir." The defendant then made a lengthy unsworn statement in which he related his history of drug addiction and his circumstances prior to his arrest in Grand Island, Nebraska.

The defendant is 29 years of age. He has previous convictions for grand larceny and petit larceny. He had been on probation for a charge of assault with intent to do bodily injury. The sentence imposed here was the minimum.

We find nothing in the record to sustain the defendant's claim that his plea was invalid. The fact that a defendant is a narcotics addict and experiencing some symptoms of withdrawal does not invalidate a plea of guilty where the record otherwise indicates that the plea was volun-

tary and entered intelligently and understandingly.

The record shows a sincere effort on the part of the district judge and the county attorney to give the defendant the benefit of every right that he had.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL BLUNT, APPELLANT.
193 N. W. 2d 434

Filed January 7, 1972. No. 37933.

1. **Criminal Law: Robbery.** An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation.
2. ———: ———. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and if it is sufficient to overcome resistance, the degree is immaterial.
3. **Criminal Law: Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Frank B. Morrison, Bennett G. Hornstein, and Paul Blunt, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an appeal from a conviction for robbery. The evidence reveals that on May 28, 1970, a cleaning establishment of Max I. Walker, Inc., was entered at about

12:20 p.m. by a person identified by two witnesses as the defendant. Defendant first entered and asked for clothes. There were none in the name given. He left and returned a few minutes later. On this occasion he entered the rear room and created a disturbance with the lady who did the pressing. The mailcarrier entered the shop and asked defendant to leave after threatening to call the police. Defendant went out with the mailcarrier but returned and the mailcarrier crossed the street. He saw defendant leave carrying something which he dropped and picked up, and then he ran down the street. In the meantime, the women in the shop were screaming. When defendant returned the third time, the lady acting as the counterclerk had waited on a customer and left the cashdrawer open. Defendant put in his hand to remove the money and she shut the drawer on his hand. He pushed her away with sufficient force that she fell and lacerated her knees. He then jerked the cashtray out on the floor, removed the money, and fled. He was apprehended about 5 minutes later approximately 2 blocks from the shop. When he saw the police officer, he attempted to flee, then surrendered. He then had a scraped area on the back of his left hand and was possessed of $111.37, a $17.16 check, and a claim check on the Walker cleaning establishment in the name of another individual. The manager testified $169.26 was missing.

We find the record sustains the conviction and that the judgment of the district court should be affirmed.

Defendant asserts the evidence is insufficient in that the use of force was not proved. An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation. See § 28-414, R. R. S. 1943. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and if it is sufficient to overcome resistance, the degree is immaterial. See, Williams v. State, 51 Neb. 711, 71 N. W. 729; Cooper v. State, 9 Md.

App. 478, 265 A. 2d 569; People v. Williams, 23 Ill. 2d 295, 178 N. E. 2d 372.

Defendant further contends that the sentence of not less than 24 years 6 months, nor more than 35 years, is excessive. The sentence is a severe one and it would have been helpful had the court, by means of questioning the defendant at the time sentence was pronounced or by other means, made defendant's background and past conduct a part of the record. The present record contains only an indication that defendant had been at least twice previously convicted of felonies. On this record we are not in position to judge whether or not the trial court abused its discretion. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion. See State v. Agostine, 184 Neb. 158, 165 N. W. 2d 353.

Another assignment of error is that contradictions in the evidence adduced required a directed verdict of acquittal. It is well established that matters of credibility are for the jury. Defendant also insists he was deprived of a chance to prepare his defense and that the record of the preliminary hearing was suppressed. These contentions are not supported by the record and are without merit.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The defendant here was convicted of robbery. He took a little over $100 in cash and checks from the cash register and shoved or knocked the cashier to her knees when she shut the cash register drawer on his fingers. There is no evidence that he displayed or used a weapon.

Following the adoption of the majority opinion, the court directed that the presentence investigation re-

ports be forwarded, and they have now been examined. The defendant is a black male born February 14, 1936, a native of Kansas City, Missouri. His felony criminal record begins in 1955 when he pleaded guilty to a charge of burglary and was sentenced to 2 years in the Missouri State Reformatory. In 1957, he was convicted of robbery, first degree, and sentenced to 5 years in the Missouri State Penitentiary. He was discharged in April of 1960 and apparently moved to Omaha, Nebraska, in June of 1960. In 1961, he was convicted of armed robbery in Douglas County, Nebraska, and sentenced to 7 years in the penitentiary. This was an armed robbery with a shotgun in which he took over $60 in cash from a service station attendant and also stole the attendant's gun. In October 1966, he was convicted of burglary, again in Douglas County, Nebraska, and sentenced to 6 years in the Nebraska Penal and Correctional Complex. He was paroled June 18, 1969, and was convicted of the robbery in this case on November 4, 1970. In this case, the sentence was solely on a robbery count. An habitual criminal charge was dismissed after the conviction on the robbery count and prior to the sentence here. The sentence was for a minimum term of 24 years 6 months to a maximum term of 35 years.

Section 29-2308, R. R. S. 1943, authorizes this court to reduce the sentence against an accused if it is excessive and enjoins on us the duty to render such sentence against the accused as, in our opinion, may be warranted by the evidence. Comparatively recently we have often repeated the holding that a sentence imposed by the trial court within the prescribed statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. That rule is repeated in the majority opinion here.

If the facts here do not warrant the intervention of this court in reducing the sentence, it is quite clear that the intended scope of section 29-2308, R. R. S. 1943, is being drastically restricted. While it may be true that

this court will add considerably to its burden by undertaking to consider excessiveness of sentences, and the inherent difficulties in attempting to achieve any sort of uniformity are obvious, nevertheless, the demands of justice require at least a reasonable effort to deal with the problem of excessive sentences.

Admittedly, the defendant's record is bad. He is clearly not entitled to any leniency whatever. Nevertheless, he ought to be entitled to even-handed justice. It seems clear that the sentence given is excessive under the circumstances. The evidence here warrants a sentence of 10 years at most. Any sentence in excess of that amount constituted an abuse of discretion.

SMITH, J., concurring.

I concur with the majority opinion, but no one should dismiss the dissenting opinion by McCown, J., lightly. My difference with him lies in a view of Nebraska practice and an intuitive reification of statutory sentencing structures, social defense, deterrence, punishment, and rehabilitation. See § 29-2260, R. S. Supp., 1971.

The sentencing judge ordinarily has been acting on a presentence report without advice from behavioral scientists. Scientific investigation occurs at the Diagnostic Center of the Division of Corrections upon admission of the prisoner. The sentencing judge may defer action to obtain a report from the Center or to order a psychiatric examination. A committed offender is eligible for parole prior to expiration of the minimum term whenever the minimum sentence provided by law, less certain reductions, has been served and the judge approves parole of the offender. See, §§ 83-1,105 and 83-1,110, R. S. Supp., 1969; § 29-2261, R. S. Supp., 1971.

When we review a sentence allegedly excessive, from necessity we ordinarily act without expertise. Prior convictions then loom out of a penal policy that grotesquely appears to subscribe to a rigorous sentence for a recidivist. In this case, however, Blunt surely needs treatment to reintegrate himself into society. He is now

a dangerous offender, a substantial threat. If treatment proves unsuccessful, his lengthy separation from society is justifiable.

The law is deeply indebted to the behavioral sciences which have ameliorated penal policy, but much remains to be done. My difference with McCown, J., is one of timing. The insight of Justice Cardozo more than 40 years ago retains vitality today:

"We have put away the blood feud, the vendetta, the other forms of private war, but in the framing of our penal codes we have not forgotten the passions that had their outlet and release in pursuit and retribution. I do not say that it is wise to forget them altogether. The thirst for vengeance is a very real, even if it be a hideous, thing; and states may not ignore it till humanity has been raised to greater heights than any that has yet been scaled in all the long ages of struggle and ascent. . . .

". . . the present system, in the view of many, is as irrational in its mercies as in its rigors, and in its rigors as in its mercies. . . .

". . . I have faith . . . that a century or less from now, our descendants will look back upon the penal system of today with the same surprise and horror that fill our own minds when we are told that only about a century ago one hundred and sixty crimes were visited under English law with the punishment of death, and that in 1801 a child of thirteen was hanged at Tyburn for the larceny of a spoon. Dark chapters are these in the history of law. We think of them with a shudder, and say to ourselves that we have risen to heights of mercy and of reason far removed from such enormities. The future may judge us less leniently than we choose to judge ourselves. . . .

"The law, like medicine, has its record of blunders and blindness and superstitions and even cruelties. Like medicine, however, it has never lacked the impulse of a great hope, the vision of a great ideal. . . .

". . . Not all her ministers have been true to the ideal which she has held aloft for them to follow. But . . . the word has been proclaimed, to steady us when we seem to falter, to strengthen us when we seem to weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudice, the spirit is still pure." M. Hall, Selected Writings of Benjamin Nathan Cardozo, 378 to 393 (1947). See, generally, Ancel, Social Defence, 215 to 221 (1965); Inbau and Carrington, "The Case of the So-Called 'Hard Line' Approach to Crime," 397 Annals of Am. Ac. Pol. and Soc. Sc., 19 (1971); Skoler, "There's More to Crime Control Than the 'Get Tough' Approach," 397 Annals of Am. Ac. Pol. and Soc. Sc., 28 (1971).

IN RE APPLICATION OF RADIO-FONE, INC., OMAHA, NEBRASKA.
RADIO-FONE, INC., OMAHA, NEBRASKA, APPELLANT, V. A.T.S. MOBILE TELEPHONE, INC., ET AL., APPELLEES, CURTIN-CALL COMMUNICATIONS, INTERVENER-APPELLEE.
193 N. W. 2d 442

Filed January 7, 1972. No. 37947.

1. **Public Service Commissions: Appeal and Error.** When an appeal is taken from the Nebraska State Railway Commission's denial of a certificate of public convenience and necessity, the only questions to be decided by this court are whether the commission acted within the scope of its authority and if the order complained of was reasonable and not arbitrarily made.
2. **Public Service Commissions: Constitutional Law: Carriers.** Under Article IV, section 20, Constitution of the State of Nebraska, the Nebraska State Railway Commission has plenary power to regulate common carriers.
3. ———: ———: ———. The constitutionally created powers and duties of the Nebraska State Railway Commission include the regulation of rates, service, and control of common carriers.
4. **Public Service Commissions: Telecommunications: Public Utilities.** Mobile telephone service in its different aspects is a form of telephone service and subject to all statutes and regulations pertaining to telephone service.

5. ———: ———: ———. A certificate of public convenience and necessity which authorizes its holder to render "telephone service," does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment, and methods then in use.
6. **Public Service Commissions: Telecommunications: Words and Phrases.** In a broad sense the term telephone or telephony includes the entire art of speech transmission with the many accessories and operating methods which research, development, and invention have supplied to facilitate and extend conversation at a distance by electrical means.
7. **Public Service Commissions: Carriers.** The object and purpose of the Nebraska State Railway Commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose.
8. **Public Service Commissions: Telecommunications: Public Utilities.** The invasion of a mobile telephone service company of the territory of another similar company, either in service or construction, is intended to be prohibited unless the invading company first applies for and receives a certificate of public convenience and necessity.
9. **Public Service Commissions: Carriers: Public Utilities.** Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons.
10. ———: ———: ———. Ordinarily, a new carrier cannot be certificated until the existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of the Nebraska State Railway Commission.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Earl H. Scudder, Jr., for appellant.

Erickson, Sederstrom, Johnson & Birmingham, Robert J. Kutak, Lewis J. Kunkel, Jr., and William B. Woodruff, for appellees.

David J. Cullan, for intervener-appellee.

Bert L. Overcash of Woods, Aitken, Smith, Greer, Overcash & Spangler, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

Radio-Fone, Inc., hereinafter referred to as Radio-Fone, applied to the Nebraska State Railway Commission, hereinafter referred to as the Commission, for the issuance of a certificate of public convenience and necessity authorizing it to operate as a domestic public land radio common carrier with its proposed base in Omaha, Nebraska, and its service area extending for a 35-mile radius. Protestants to the application were A.T.S. Mobile Telephone, Inc., Business Executive Services, Inc., and Nebraska Mobile Telephone Company, and intervener Curtin-Call Communications. A.T.S. Mobile Telephone, Inc., hereinafter referred to as A.T.S., objected on the ground that it already holds a certificate of public convenience and necessity under which it renders a similar telephone service in the 35-mile radial area Radio-Fone proposed to serve. The other three protestants objected on the ground that they *also* proposed to offer radio telephone service to the area being serviced by A.T.S. The Commission was thus faced with four proposals to furnish competitive service to the licensed carrier. Only one, Radio-Fone, appeals.

The Commission conducted hearings in November 1969 and January 1970 and, thereupon, entered an order denying the application. Radio-Fone appeals to this court claiming that the Commission acted arbitrarily, unreasonably, and outside lawful authority in denying the application.

Although the heart of a radio common carrier's task is to provide telephonic communication via radio wave, the essential service may take many peculiar forms. Basically, Radio-Fone proposed to offer two types of radio telephone services. The first, an automatic dial one-way paging system, would allow a landline telephone caller to dial directly into a mobile paging unit

and state his message without operator assistance. The mobile paging unit would receive the message but would have no transmission capability. The second proposed service was an automatic dial, duplexed (simultaneous talk and listen) two-way mobile communications system that would have no operator intervention when calling from a mobile unit to a landline system, but with operator intervention from a landline telephone to a mobile unit.

At the time of the hearings, A.T.S. was offering a duplexed two-way mobile service with operator intervention on two channels and on a third channel, a tone-and-voice one-way paging service with the operator relaying the message after activating a tone-emitting mechanism to alert the mobile unit. From the evidence presented, automation, the by-passing of operator intervention, appears to have been the primary difference between the services proposed by Radio-Fone and those being rendered by A.T.S.

Besides an apparent attempt to characterize the services offered by A.T.S. as antiquated, Radio-Fone introduced evidence at the hearings to show that A.T.S. was not performing adequately the services it did offer. Some witnesses for Radio-Fone testified that as or having been subscribers for either the mobile telephone or paging services provided by A.T.S., they were of the opinion the service provided had been less than exemplary. Generally their complaints related to the overcrowding of the radio channels and the improper relaying of messages by the A.T.S. operators. In opposition thereto A.T.S. subscribers testified that the service was adequate and had improved recently. A.T.S. had moved to new facilities and had received additional FCC licensed radio channels for communication to mobile units.

A.T.S. offered evidence at the hearings to show that there were reasons for the subscribers' temporary dissatisfaction with services; that the problems had been resolved; and that A.T.S. was moving ahead to provide

better service in the future. The record shows that in September 1968, the joint owners of A.T.S. became involved in litigation concerning the exercise of an option to purchase the corporation by one of the joint owners. Amidst this turmoil in management, in January and April 1969, A.T.S. filed applications with the FCC for additional radio channels, and to thus improve and furnish new service, but the FCC held the applications pending the termination of the litigation between the joint owners.

It was at this point in the history of A.T.S. that Radio-Fone submitted its application to the Commission for a certificate of public convenience and necessity, asserting in answer to interrogatories submitted in August of 1969 that "A.T.S. cannot provide service because of legal problems." In September of 1969, the litigation over the control of A.T.S. terminated, the corporation moved into new facilities, and a letter was sent to the Commission describing current developments within the corporation and promising further development. On November 14, 1969, A.T.S. received its second *two-way mobile channel license* from the FCC and on November 13, 1969, was also granted a construction permit for a *one-way paging channel* which was prior to the Commission's hearings on Radio-Fone's application.

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756 (1937), we said that when an appeal is taken from the Nebraska State Railway Commission's denial of a certificate of public convenience and necessity, the *only* questions to be decided by this court are whether the Commission acted within the scope of its authority and if the order complained of was reasonable and not arbitrarily made. Shanks v. Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441; Canada v. Peake, Inc., 184 Neb. 52, 165 N. W. 2d 587. After a review of the record, we are not convinced that the Commission's action was arbitrary and unreasonable in relation to the facts presented at the hearings. Although there is evi-

dence that A.T.S. may have provided less than exemplary service, we cannot say upon review of the facts that the Commission's determination that the service provided was not less than "reasonably adequate," was unreasonable or arbitrary.

The real issue in this case is whether the Commission exceeded its powers under the law in its denial of Radio-Fone's application. There is no question that under Article IV, section 20, of the Constitution of the State of Nebraska, the Nebraska State Railway Commission has plenary power to regulate common carriers. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*. In the absence of specific legislation, the powers and duties of the Commission, as enumerated in the Constitution, are absolute and unqualified. State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502. The constitutionally created powers and duties of the Commission include the regulation of rates, service, and control of common carriers. In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192; Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 103 Neb. 695, 173 N. W. 690.

Thus, the Commission shoulders a heavy burden in regulating common carriers in the public interest. This court has long recognized that it is the primary duty of the Commission, and not this court, to act as ongoing supervisor of the conduct of intrastate common carriers. In this regard, we have long noted the limited nature of the review that this court can give on appeal of an order of the Commission. In re Lincoln Traction Co., *supra;* Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234; Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*; Moritz v. Nebraska State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

We have recognized that the Commission has continuing jurisdiction over its orders in regard to the regulation of common carriers, with the doctrines of collateral estoppel and res judicata having no application

whatever. Simmerman v. National Trailer Convoy, Inc., 179 Neb. 400, 138 N. W. 2d 481; Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584; Neylon v. Petersen & Petersen, Inc., 183 Neb. 813, 164 N. W. 2d 452; Canada v. Peake, Inc., *supra.*

Radio-Fone argues that a proper interpretation of section 75-604, R. R. S. 1943, requires a reversal because an improper burden of proof was required of it. We reject this contention. The statute provides: "No person, firm, partnership, corporation, cooperative, or association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission. Before granting a certificate of convenience and necessity, the commission must find that *(1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines is not and will not within a reasonable time receive reasonably adequate telephone service from the telephone company already serving the territory,* or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." (Emphasis supplied.)

Radio-Fone itself invokes the application of this statute. It therefore cannot properly deny that the mobile service and specialized facilities it uses are not "telephone service" and not subject to Commission regulation. Moreover, the courts have generally held that mobile telephone service in its different aspects is a form

of telephone service and subject to all statutes and regulations pertaining to telephone service. State ex rel. Utilities Commission v. Two Way Radio Service, Inc., 272 N. C. 591, 158 S. E. 2d 855 (1968); Commercial Communications, Inc. v. Public Utilities Commission, 50 Cal. 2d 512, 327 P. 2d 513, app. dism. and cert. den., 359 U. S. 119, 341, 79 S. Ct. 722, 896, 3 L. Ed. 2d 674, 927.

In State ex rel. Utilities Commission v. Two Way Radio Service, Inc., *supra,* the court said: "A certificate of public convenience and necessity which authorizes its holder to render 'telephone service,' does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. * * * The Commission and the courts may take judicial notice of the well known fact that telephone companies today habitually transmit conversations by electrical impulses traveling through part of the intervening space without proceeding upon wires. There transmissions are a part of 'telephone service' as that term is used and understood today. See Commercial Communications v. Public Utilities Commission, 50 Cal. 2d 512, 327 P. 2d 513, app. dism. and cert. den., 359 U. S. 119, 341, 79 S. Ct. 722, 896, 3 L. Ed. 2d 674, 927."

Closely applicable to the present case is the following from Commercial Communications, Inc. v. Public Utilities Commission, *supra*: "The word 'telephone' is not defined in the code. In its narrow sense 'telephone' refers to the instrument by which telephony is achieved. It is defined in Webster's New International Dictionary, 2d edition as 'An instrument for reproducing sounds, especially articulate speech, at a distance.' In defining 'telephony' the Encyclopaedia Britannica (1954 ed.) states 'In a broad sense the term telephone or telephony

includes the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means.' * * * In common understanding the communication effected by private mobile systems would appear to be a telephone communication."

It is clear, therefore, either under the general constitutional power of the Commission (Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*, and subsequent cases) or the specific statute sought to be interpreted, section 75-604, R. R. S. 1943, that a licensed operating telephone company (mobile service included) has a monopoly, subject to regulations by the Commission of all forms of telephone service within its defined area.

Directly applicable here is our holding in the recent case of Northwestern Bell Tel. Co. v. Consolidated Tel. Co., 180 Neb. 268, 142 N. W. 2d 324, where we said: "This court has said that the object and purpose of commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc., 179 Neb. 735, 140 N. W. 2d 400.

"We have also said: 'It is clear that the invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity.' Sherdon v. American Communications Co., 178 Neb. 454, 134 N. W. 2d 42.

"This court, *even in the absence of a statute* regarding duplication of facilities, has stated: *'Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest.* Such a competing line will be authorized *only for compelling reasons.'* In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. See, also, The Greyhound Corp. v.

American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664." (Emphasis supplied.)

The force of the above language is an extension of the basic proposition that in Nebraska the concept of public utility regulations now is and always has been, one of regulated monopoly. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra;* In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296; The Greyhound Corp. v. American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664.

Confining ourselves to the statute, section 75-604, R. R. S. 1943, the act prohibits, by its terms, anyone from offering telephone service in the "territory of another telephone company" without a certificate by the Commission. Such a certificate can be granted only (1) if the area is "not receiving reasonably adequate telephone service" and (2) "will not within a reasonable time receive reasonably adequate telephone service." Both of these requirements must be met. The suggestion of Radio-Fone to the contrary is patently erroneous. The purpose is to permit no duplication unless the existing company is not and will not in a reasonable time furnish adequate service. The act puts into effect the existing carrier rule applied by this court in numerous public utility cases—that a new carrier cannot be certificated "until the existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of the commission." The Greyhound Corp. v. American Buslines, Inc., *supra.*

The Commission's determination that Radio-Fone had not met its burden of proof under the statute and the applicable case law was not arbitrary, capricious, or unreasonable, and was within the authority permitted by the applicable statute and the constitutional powers of the Commission. Its judgment is therefore affirmed.

AFFIRMED.

CHARLES E. GRANTHAM AND THEORA GRANTHAM, HUSBAND AND WIFE, APPELLANTS, V. GENERAL TELEPHONE COMPANY OF THE MIDWEST, A CORPORATION, ET AL., APPELLEES.
193 N. W. 2d 449

Filed January 7, 1972. No. 37961.

1. **Courts: Jurisdiction: Appeal and Error: Judgments: Motions, Rules, and Orders.** Jurisdiction of this court over appeals from district court is based on final judgments or orders. An order that affects a substantial right in a special proceeding is final.
2. ———: ———: ———: ———: ———. Ordinary burdens of trial are insufficient for this court to classify an otherwise interlocutory or partial summary judgment with orders that affect substantial rights.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Appeal dismissed.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Ross & Schroeder, Luebs, Tracy, Huebner & Dowding, and Tye, Worlock, Tye, Jacobsen & Orr, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Plaintiffs alleged that defendants in constructing a building next to plaintiffs' existing building caused plaintiffs physical damage and loss of business profits. Defendants answered that plaintiffs had agreed at least to a method of fixing the physical damage. They also moved for summary judgments on general statutory grounds.

The district court sustained the motions for summary judgments on the issue of physical damage. On the issue of lost profits, however, the court overruled the motions. The journal order stated that liability on the latter issue remained a jury question as to all defendants. Plaintiffs attempted to lodge an appeal in this court.

On our own motion and after argument we examine appealability of the order. Our jurisdiction over appeals from district court is based on final judgments or orders. A final order is one (1) affecting a substantial right in an action, when it in effect determines the action and prevents judgment, or (2) affecting a substantial right in a special proceeding or upon summary application in an action after judgment. A judgment is the final determination of the rights of the parties in an action. Unless the context is shown to intend otherwise, "action" includes any proceeding in a court. See, Art. V, § 2, Constitution of Nebraska; §§ 25-1301(1), 25-1902, 25-1911, and 49-801(2), R. R. S. 1943.

Ordinary burdens of trial are insufficient for us to classify an otherwise interlocutory or partial summary judgment with orders that affect substantial rights. Hart v. Ronspies, 181 Neb. 38, 146 N. W. 2d 795 (1966); cf. 6 Moore's Federal Practice (2d Ed., 1971), §§ 56.20(3.-0), 56.20(3.-2), 56.20(4), and 56.21(2), pp. 2745, 2754 to 2756, 2767, and 2789; Moore's Federal Practice Rules Pamphlet (1970), 940 and 941. That rule governs here. This case is not one in which the court in determining substantial rights only retained the cause for determination of incidental matters. See Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32, 16 A. L. R. 3d 363 (1963).

APPEAL DISMISSED.

CLARA SCHLEUSENER, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF EDWARD SCHLEUSENER, DECEASED, APPELLEE, V. NEBRASKA TRACTOR & EQUIPMENT COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH CUMING COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.
193 N. W. 2d 438

Filed January 7, 1972. No. 37970.

1. **Motions, Rules, and Orders: Trial: Judgments: Courts.** In a

case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

2. **Motions, Rules, and Orders: Trial: Evidence.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN and JOHN C. BURKE, Judges. Reversed and remanded with directions to dismiss.

Fraser, Stryker, Marshall & Veach, for appellant.

M. J. Bruckner of Marti, O'Gara, Dalton & Bruckner, for appellee Schleusener.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SPENCER, J.

This is an action for the wrongful death of Edward Schleusener while a passenger in an automobile owned and operated by an employee of the Nebraska Tractor & Equipment Company. Deceased died from carbon monoxide poisoning on March 22 or 23, 1966, while an occupant of a stalled automobile, during a violent snow storm. Judgment was rendered for the plaintiff executrix. We reverse.

On March 22, 1966, Joseph Grasso and Charles W. Martin, employees of the Nebraska Tractor & Equipment Company transported the deceased and five other members of the board of county commissioners of Cuming County to Grand Island to inspect a road maintainer and a tractor for which the board was negotiating. The

deceased and two of the other commissioners rode with Martin in his 1966 Buick automobile which it is stipulated was being operated in the business of the company. The weather on the morning of March 22, 1966, was mild, "like a spring day," although there was some light rain or mist in the air. The occupants of both cars wore light clothing. There was no indication of a serious weather change. They reached Grand Island shortly before noon.

Both automobiles left Grand Island sometime before 2 p.m., with the Grasso car in the lead. The parties were headed for Dodge where they were to discuss the transaction. It was then the intention to drop off one of the commissioners at that point, with the others going on to West Point. The weather was then cloudy and rainy. The two vehicles proceeded east on U. S. Highway No. 30 to Central City, then north from Central City on State Highway No. 14 to Albion, where they turned east onto State Highway No. 91. The rain had turned to snow, and it was getting slushy. The snow had gotten heavier as they approached Albion and Grasso reduced the speed of his vehicle to 40 miles per hour. After passing Albion the cars passed through or around the towns of Lindsay, Humphrey, Creston, Leigh, and Clarkson. By the time they passed Clarkson the snow was very heavy and the wind, which had suddenly turned to the northwest, was increasing in velocity.

About 15 rods west of Clarkson a truck forced the Grasso car off the road. It was then approximately 4:30 p.m. The Martin car pulled up alongside. Grasso told Martin that he would be able to get his car going again, and to go ahead. Martin pulled out. A truck came by, and then Grasso proceeded forward. Grasso and the occupants of his car never saw the Martin car again. In a very short period the snow got heavier, visibility became poor, and the Grasso motor started to sputter and miss. Grasso drove approximately another mile and the car stopped. It was then about 5:05 p.m. Grasso

testified that the storm by then had suddenly accelerated in intensity. "When I first pulled off it just seemed like it was a matter of a few minutes and everything zeroed in." The occupants of the Grasso car testified that the weather was real bad; they couldn't see; and they decided to stay in the car. Grasso tried to start his motor from time to time, but was unable to do so. The occupants of the Grasso car remained in the car until they were found about 11 a.m. the next morning.

The Martin car was found on the south side of Highway No. 91 at approximately 2 p.m., March 23, with its front wheels on the highway and its rear wheels off the road. It was about 2½ miles east of Howells and about 3½ miles west of Dodge. It was stipulated the four occupants of the car were dead and had died from carbon monoxide poisoning. The trunk lid was open and sprung, so that it could not be closed. The right front vent of the car was open enough to permit one of the witnesses to put his fingers in it. The car was running, the heater was on, and the radio was playing. The exact time that the Buick reached the point where it was found is not known, but from the record we assume it was before 6 p.m. The Martin car was found less than 10 miles from where the Grasso car stopped.

The evidence is fairly conclusive that none of the parties had heard storm warnings of any kind, and that the storm came up suddenly and was probably the worst storm some of them could remember. A farmer from the Howells vicinity testified as follows: "Q. How do you recall this storm, when did it come up and what did you notice? A. Well, for one thing, it came up so quick that it never give nobody a chance to realize what was really going to happen because we have never had a storm like this for many years, as long as I can remember I have never seen one that came up that quick."

It was stipulated "that the Buick Wildcat automobile owned and operated by Charles W. Martin, within the scope of his employment, and while on company busi-

ness for the Defendant on March 22, 1966, was in all ways in a good and operable condition with no defects, with the understanding, however, that the day following this tragedy, as was testified to by various witnesses, the trunk lid was open and sprung, open to the degree that it took three men, as testified to by one of the witnesses, to try and force it down."

Plaintiff's expert witness, an assistant professor of mechanical engineering at the University of Minnesota, in response to a hypothetical question as to whether the carbon monoxide would enter the trunk, testified as follows: "It is my opinion that carbon monoxide from the—being discharged from the tailpipe could get in and would get in to the vehicle by means of getting into the trunk from underneath and inside of the bumper and up over into the trunk area where it could mix with the air and be forced forward or would simply by mixing with the air flow forward and into the occupied area of the vehicle, there being no complete restriction preventing that."

On cross-examination, plaintiff's expert testified as follows: "Q. And that is shown in these photographic exhibits that I have just shown you and specifically, because it appears so clearly in Exhibit 7, being color, if the wind came from the northwest across the rear end of that car with the trunk lid up and the exhaust pipe down here in the lower right-hand corner, couldn't it very well blow it right on around the side of the car? A. Some of the exhaust would probably go around the side, but some of it also accumulates underneath the bumper and comes up and around and across the bumper here and spills over into the trunk."

Defendant sets out seven assignments of error. We consider only the one involving the overruling of defendant's motion for judgment notwithstanding the verdict.

In Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144, we held: "In a case where a motion has been

made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict."

We examine the record herein pursuant to the general rule applicable to such motions enunciated in Corbitt v. Omaha Transit Co., *supra:* "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

Before the plaintiff can recover herein she must prove that the defendant was negligent in one or more of the particulars claimed by her, and that such negligence was a proximate or contributing cause of the death of the deceased.

We have set out enough of the evidence to determine if plaintiff proved actionable negligence by a preponderance of the evidence. Plaintiff alleges that Martin was negligent in failing to stop his vehicle in a place of safety when he knew or in the exercise of reasonable care should have known that the severe weather conditions presented an unreasonable risk of injury or harm to the passengers.

As we view the record, it is conclusive that the storm suddenly accelerated in intensity. The last time the Martin car was seen was when Martin stopped to see if Grasso needed help and was told to go on. What happened thereafter must be left entirely to conjecture because there were no eyewitnesses and the actions of Martin and the occupants of his car are unknown. What

can we say Martin did or failed to do that a reasonably prudent person would or would not have done? From hindsight, we may say the occupants of his car would not have died if he had driven into Howells and sought shelter. Yet the Grasso car stalled and its occupants remained in the car and survived. There were also other vehicles caught in the storm without the fatal result experienced by the occupants of the Martin car. The deaths were not caused by exposure but by carbon monoxide poisoning.

Is the evidence sufficient to permit a jury to find that a reasonably prudent person would have stopped before the point at which the Martin car was stopped or, more important, that the decision to attempt to reach Dodge was solely that of Martin? The car, which was headed for Dodge, Nebraska, was found 3½ miles from that point. While the car passed within a mile of the town of Howells, 2½ miles from which it was found, and possibly might have been driven into that town, we cannot say that Martin was negligent in failing to do so. The occupants of his car were county commissioners of Cuming County. They undoubtedly were much more familiar than he with the territory through which they were passing. If we were to indulge in speculation, which we would do to find a jury question on this issue, it would be just as reasonable to believe that the occupants of the car were encouraging Martin to drive forward on the main highway rather than to take the spur road into Howells.

The cause of death was carbon monoxide poisoning. How, if at all, was Martin responsible for the death? Plaintiff's main claim of negligence is that Martin was negligent in operating his automobile with the trunk lid up after it became stalled. There is no evidence as to how the trunk was opened, by whom, or when. The evidence is conclusive that when the car was found the trunk lid was sprung and could not be closed. However, it is not the opening of the trunk but the running of the

motor with the trunk lid open which plaintiff asserts as negligence. The vehicle was stopped or stuck at the point where found; the occupants were dressed in light clothing; and the storm was such that it would not have been practical for the occupants to leave the car. The car heater and the radio were on, and the motor was running at the time the car was found. As to whether it had been running continuously, we have no way of knowing. The evidence is undisputed that one of the car vents was open sufficiently to permit a witness to put his fingers through it.

It is the plaintiff's theory that the exhaust fumes from the car curved up into the open trunk and then seeped into the automobile, and that Martin as the owner and driver should have anticipated this result. In attempting to reconstruct the deaths 5 years later, where no tests were performed at the time, we can only theorize as to how the carbon monoxide fumes entered the car. Although plaintiff's expert, who inspected the car 5 years later, and studied some photographs of it, was of the opinion that if the trunk lid had been closed there would have been little likelihood of carbon monoxide poisoning, he did not examine the muffler system or run the engine, and admitted he had no way of knowing the condition of the system at the time of the deaths. It was stipulated that the car was in a good and operable condition with no defects on March 22, 1966.

Exhibits 5 and 7, which are photographs of the rear of the Martin car when found, would indicate a buildup of snow which covered the rear bumper of the car. How soon this happened after the car was stalled, or with relation to the time the trunk was opened or the time of the deaths of all the occupants, is of course not known, and any conclusions we might draw would be pure speculation. From the photographs we could surmise that after the buildup of the snow, the carbon monoxide came out the two ends of the rear bumper or passed under the car to the front end which was partly open.

However, if we assume that carbon monoxide coming through the trunk was the method by which the deceased was asphyxiated, we still have the question as to whether Martin's failure to realize this possibility would be sufficient to charge him with negligence. We do not believe plaintiff met her burden of proving that some negligence of Martin was the cause of decedent's death.

Defendant's motion for judgment notwithstanding the verdict should have been sustained. The judgment is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CLINTON, J., participating on briefs.

NEBRASKA MIL-NIC, INC., A CORPORATION, APPELLANT, V. HALL COUNTY, NEBRASKA, ET AL., APPELLEES, CITY OF GRAND ISLAND, NEBRASKA, ET AL., INTERVENERS-APPELLEES.

193 N. W. 2d 450

Filed January 7, 1972. No. 37983.

1. **Statutes: Limitations of Actions: Municipal Corporations: Annexation.** Section 18-1717, R. R. S. 1943, enacted with the emergency clause on April 29, 1967, provides for a 1-year limitation period in which a party may contest any annexation or contest any act done prior to April 29, 1967, pursuant to such annexation, which annexation was made pursuant to any statute of this state which has been, on April 29, 1967, declared to be unconstitutional.
2. **Statutes: Limitations of Actions.** A special statute of limitations, where applicable, controls over a general statute of limitations because the special statute is the one that more properly expresses the legislative will.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

E. Merle McDermott, for appellant.

Sam Grimminger and Gerald Buechler, for appellees.

Duane A. Burns, Kenneth H. Elson, James D. Livingston, and Walter Lauritsen, for interveners-appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an action for the refund of real and personal property taxes. Plaintiff alleges that its property was purportedly annexed to the City of Grand Island on November 20, 1963, by virtue of Ordinance No. 4075. On March 15, 1968, the district court for Hall County in a case entitled Pokorski v. City of Grand Island (following our decision in Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776), adjudged Ordinance No. 4075 to be unconstitutional and void, and the taxes levied by the city and School District No. 2 were therefore void. Plaintiff, relying on this ruling, prays for a refund of taxes for the years 1964, 1965, and 1966, a sum in excess of $30,000. This action was commenced on November 13, 1969, by the filing of a claim with the Hall County Treasurer and Board of Supervisors, pursuant to section 77-1736.04, R. S. Supp., 1967, the general tax refund statute. The County Board denied the refund and an appeal was taken to the district court. The district court dismissed the action, holding that it was barred by the statute of limitations. We affirm the judgment of the district court.

Section 77-1736.04, R. S. Supp., 1967, provides in part: "If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any personal property or real estate tax, assessment, or penalty or any part thereof, was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax, assessment, or penalty, then such tax, assessment, or penalty, whether expended or not, which has been collected pursuant to such illegal tax,

assessment or penalty for the year such tax, assessment or penalty is determined to be illegal shall be repaid and refunded in the county where originally paid to the person paying such tax, assessment, or penalty. * * * If the tax, assessment, or penalty has been distributed by a collecting officer, then the person claiming a refund, or the agent or authorized representative of such person, shall file a claim with the county treasurer for such refund within two years after the final judgment is entered declaring such tax, assessment, or penalty as illegal."

Plaintiff contends that the tax was adjudged void in the Pokorski case which was decided March 15, 1968, and that he has commenced his action for the refund within 2 years of that date and hence within the statutory period.

The defendants contend that the applicable statute of limitations is section 18-1717, R. R. S. 1943, and that under its terms this action is barred because it was not commenced within 1 year from April 29, 1967. The statute provides: "Any party affected by any annexation of property made by any city or village prior to April 29, 1967, *whose rights have not already been barred by any other applicable statute of limitations,* shall be required to commence any action or proceeding of any kind or nature, whether legal or equitable, to contest such annexation or to contest any act done prior to April 29, 1967 pursuant to such annexation, within one year from April 29, 1967 or the same shall be forever barred. The period of time prescribed by this section for bringing an action shall not be tolled or extended by nonresidence or disability. The limitation of this section shall also apply to any action or proceeding of any kind or nature, whether legal or equitable, to contest any annexation or to contest any act done prior to April 29, 1967 pursuant to such annexation, which annexation was made pursuant to any statute of this state which has

been, on April 29, 1967, declared to be unconstitutional." (Emphasis supplied.)

We agree that section 18-1717, R. R. S. 1943, is applicable in this case. An examination of the underlying history fortifies this conclusion.

In 1963 the Legislature enacted L.B. 338, Laws 1963, c. 59, p. 249. This bill revised the procedures for extending the boundaries of cities of the first class. Ordinance No. 4075, under which plaintiff's property was annexed to the City of Grand Island, was enacted pursuant to the terms of L.B. 338. On *January 6, 1967,* this court rendered its decision in Williams v. County of Buffalo, *supra,* declaring L.B. 338 unconstitutional. This invalidation of the enabling statute undermined all municipal annexation ordinances enacted under it. Cities of the first class were thus exposed to a potential financial crisis in that annexations and the taxes levied under them were stripped of their legality, and numerous tax refund claims could be expected. Section 18-1717, R. R. S. 1943 (enacted with the emergency clause on April 29, 1967), was specifically designed to alleviate their predicament by strictly limiting the period during which such claims could be made. The 1-year statute of limitations is reasonable, serves a good policy, and was obviously designed to deal with precisely the situation before the court.

The phrase "to contest any act done * * * *pursuant* to such annexation," in section 18-1717, R. R. S. 1943, is clearly broad enough to encompass an attack on taxes levied by virtue of a purportedly illegal annexation. Thus, both this statute, and section 77-1736.04, R. S. Supp., 1967, deal with the general subject of contesting illegally collected taxes. Under these circumstances, the special statute of limitations enacted in 1967 dealing with annexation controls over the more general limitation of actions for tax refunds, because the special statute is later and specifically expresses the legislative will. Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE A. WATERS, APPELLANT.
193 N. W. 2d 453

Filed January 7, 1972. No. 38132.

Criminal Law: Evidence. Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

Appeal from the district court for Pawnee County: WILLIAM F. COLWELL, Judge. Affirmed.

Peter Burrill Beekman, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found Eugene A. Waters guilty of burglary, this court having granted him a new trial in State v. Waters, 186 Neb. 257, 182 N. W. 2d 214 (1970). On appeal he assigns insufficiency of the evidence for error.

Someone broke into a gas station at Table Rock at night on November 21-22, 1969, a Friday and Saturday. A few small coins and checks were lying in the area. The intruder stole 8 to 13 salted peanut roll bars of the 10-cent size and approximately $158, less the change and checks dropped there. The sum stolen comprised bills, coins, and perhaps checks. Among the coins were a roll of quarters and loose quarters totaling $15 to $20, a few pennies, no dimes, some nickels, and one 50-cent piece.

A state patrolman, Robert Chab, and the sheriff,

Charles Hall, testified as follows. Saturday, November 22, 1969, at 9 a.m., in Table Rock, they entered an abandoned house without doors or window glass. In one room they found Waters in bed with seven salted peanut rolls of the 10-cent size. Chab found $2.69 in Waters' topcoat, and Hall found $60 in the pocket of Waters' trousers. The sum of $2.69 consisted of quarters, a dime, nickels, and pennies. The $60 sum comprised a $20-bill, two $10-bills, and four $5-bills.

When Waters exposed the candy by sitting up in bed, he volunteered: "I can explain the candy bars." Interrupting Miranda warnings, he said he had purchased the candy bars at a bus stop located 6 miles east of Humboldt. He also fixed the time of his arrival at the house at midnight or 2 a.m. that morning.

After departure of Hall and Waters, Chab discovered $71 in a dried cornhusk in the room that Waters had occupied. The sum comprised two $20-bills, three $5-bills, and sixteen $1 bills. At the gas station, Hall in searching Waters' sports jacket found $17 which comprised 65 quarters, 5 nickels, and 1 50-cent coin.

Waters testified as follows. He possessed $71 when he entered Nebraska from Iowa. While in Omaha, he earned $50. When he arrived in Table Rock the day before the burglary, he had $149 to $153. The difference between the latter sum and $121 represented winnings at pocket billiards. He had purchased 11 peanut roll bars in Omaha and 1 at the bus stop near Humboldt. He admitted telling the officers that he had purchased candy at Humboldt without mention of the Omaha purchase. During his travels in Nebraska that week, he accumulated coins in placing a number of long distance telephone calls. He traveled to Table Rock in search of a job, but after arrival there he decided to look elsewhere.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v.

Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). The evidence against Waters is sufficient.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID ADAMS, APPELLANT.
193 N. W. 2d 579

Filed January 14, 1972. No. 37799.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Evidence.** Voluntary statements made by a defendant are ordinarily admissible, especially when the defendant was not in custody when the statements were made.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

David L. Herzog, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant was charged and convicted of manslaughter in connection with the death of his wife who died by reason of being shot in the hand and head with a shotgun. We affirm the judgment of the district court.

Defendant asserts the evidence is not sufficient to sustain his conviction and that the admission of certain statements attributed to him was erroneous.

The evidence was conflicting. On review it appears that the jury could justifiably find as follows: Defend-

ant had been out most of the night and returned home early in the morning. A tenant in an apartment across the hall had seen and talked with defendant about 5:30 to 5:45 a.m. the morning his wife was killed, and shortly thereafter heard some loud talking, a woman scream, and a sound like a door banging emanating from the direction of defendant's apartment. At about 8:50 a.m. defendant returned to the neighbor's apartment and said: "I killed my wife." He asked the neighbor to go get the baby. The neighbor entered defendant's apartment and found the body whereupon he returned to his own apartment and called the police. Defendant was nervous, crying, and appeared dazed. When the police arrived, two of them heard defendant volunteer the statement: " 'I was out messing around and I came home, we argued.' " Defendant's defense consisted of an alibi. He and a woman acquaintance stated he had been in her apartment from about 6 a.m. to 8:45 a.m. The woman made contradictory statements to the police, on one occasion stating defendant had left her at about 7:10 a.m. and further stating defendant had not spent the night with her but if it would help him, she would say he had. Later she said he had gone to bed with her. No one admits to having heard the shot and the time of death could not be definitely established. Defendant admits he and his wife had troubles; that he had struck her on several occasions; and that he anticipated trouble when he returned home the morning of her death. The shotgun used was one belonging to a brother of defendant but kept in defendant's apartment together with a box of shells of the type and make fired. Under all the circumstances, we find the evidence sufficient to sustain the conviction. "In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence." State v. Howard, 184 Neb. 461, 168 N. W. 2d 370.

Defendant maintains the volunteered statements attributed to him were not admissible in evidence because he was dazed or suffering from shock. It does not appear that defendant was irrational at any time and voluntary statements made by a defendant are ordinarily admissible, especially when the defendant was not in custody when the statements were made. See State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

OLGA VIRKA ET AL., APPELLANTS, V. EDGAR KNOX, SUPERINTENDENT OF SCHOOLS, SAUNDERS COUNTY, NEBRASKA, ET AL., APPELLEES.
193 N. W. 2d 573

Filed January 14, 1972. No. 38016.

1. **Schools and School Districts: Statutes: Time.** The determination as to the validity and sufficiency of petitions for school district reorganization filed under sections 79-402 to 79-404, R. R. S. 1943, and R. S. Supp., 1969, is made as of the date the petitions are filed with the county superintendent by the county committee for school district reorganization.
2. ———: ———: ———. By its terms, section 79-402, R. R. S. 1943, provides that the petitions, although presented to the county committee prior to the time of holding the statutory public hearing, shall not be filed with the county superintendent until 10 days following a public hearing.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Sidner, Svoboda & Schilke and G. Michael Wiseman, for appellants.

Robert E. Sullivan and Everett O. Inbody, for appellee Knox.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a case involving the procedure for school district reorganization within a county under sections 79-402 to 79-404, R. R. S. 1943, and R. S. Supp., 1969. Boiled down, the essential question involved in this case is whether the county superintendent, in examining the petitions for the reorganization of the school district under the statutes involved, should have taken the date of July 9, 1970, being the date upon which the petitions for reorganization were filed with him, as the date for making a final determination of the validity of the signatures and the number of qualified legal voters in the district. The district court held that the date upon which the petitions were *filed* with the county superintendent on July 9, 1970, was the correct date. We affirm the judgment of the district court.

No challenge is made in this error proceeding as to the compliance by the appellees with the procedural provisions and requirements of section 79-402, R. S. Supp., 1969. The statute provides in part: "Petitions proposing to create a new school district or to change the boundary lines of the existing school districts shall, when signed by at least sixty percent of the legal voters in each district affected, be submitted to the county committee for school district reorganization * * *. The county committee shall, within forty days, review and approve or disapprove such proposal and submit it to the state committee for school district reorganization. The state committee shall, within forty days, review and approve or disapprove the proposal and return said proposal, with any recommendations deemed advisable, to the county committee. The county committee shall, within fifteen days of receipt of the returned proposal, consider the action of the state committee and determine whether to give final approval or disapproval to the proposal. The county committee shall also, within fifteen days of receipt of the returned proposal, advertise and hold a public hearing at which the recommenda-

tions and action of the state and county committees shall be *presented* to the legal voters in attendance. *The county committee shall hold the petitions for ten days following the hearing, at the end of which time the committee shall file the petitions with the county superintendent.*" (Emphasis supplied.)

The county superintendent found that on May 1, 1970, a petition containing the signatures of 35 legal voters, and accompanied by a list of all of the legal voters in said district at that time, shown to be 53, was presented to the secretary of the county committee for reorganization of school districts for Dodge and Saunders Counties. It is apparent from the statutes involved that if the proper date for the determination of the validity of the petition was May 1, 1970, the petition complied with the 60 percent requirement.

But the county superintendent also found that on July 9, 1970, the last date upon which names of legal voters could be added to or deleted from the petition, there were 56 legal voters in the district. In this determination the county superintendent included three persons who had qualified as legal voters in said district after May 1, 1970. On July 9, 1970, the remaining legal signatures on the petition numbered 32, and thus the county superintendent found that the petition was legally insufficient to meet the 60 percent requirement. We have the simple proposition of determining at what point in time the county superintendent should make a final determination both as to the number of valid signatures on the petition and the number of qualified voters against which this number is compared for the determination of the percentage requirement.

We consider our holding in Harnapp v. Bigelow, 178 Neb. 440, 133 N. W. 2d 611, as determinative of the issue in this case. In the Harnapp case this court stated as follows: "Although section 79-404, R. R. S. 1943, requires that a list of the legal voters in each district affected be given to the county superintendent when the

petition is presented, the validity or sufficiency of the signatures upon the petition is not determined upon the basis of this list alone. Section 79-402, R. S. Supp., 1961, requires the county superintendent to advertise and hold a hearing for the purpose of determining the validity and sufficiency of the petitions after they have been filed with the county superintendent. *The determination as to validity and sufficiency is made as of the date that the petitions are filed with the county superintendent.*" (Emphasis supplied.)

It is obvious from reading the above statute what the legislative intent was. The selection of the language used is significant. The statute contemplates that there is an intermediate period of time in which the petition must be sent to the state committee for school district reorganization for the securing of its approval. The statute provides that the petition shall "*be submitted*" to the county committee for school district reorganization. It then provides that within 15 days after receipt of the returned proposal it must advertise and hold a public hearing at which time the "recommendations and action of the state and county committees shall *be presented* to the legal voters in attendance." The statute specifically provides that following compliance with these procedures the committee "*shall file* the petitions with the county superintendent." It therefore becomes clear that by its terms, section 79-402, R. S. Supp., 1969, specifically provides that the petition is not *filed* with (only "submitted" and "presented" to) the county superintendent until it has gone through two county meetings, a state committee meeting, and a hearing has been held. The Harnapp case, *supra,* fixes that date of filing as the time when the county superintendent shall make a determination of both the validity and sufficiency of the petitions.

The record is conclusive that the county committee *filed the petitions* with the county superintendent on July 9, 1970, thus July 9, 1970, rather than May 1, 1970,

is the critical date for the determining of the validity and the sufficiency of the petitions in this case. The district court so held.

Independent of the above analysis, we would be required to reach the same conclusion in the light of the purpose, design, and scheme of the statute. Other statutes and our case decisions have clearly held that signatures of legal voters may be added to or withdrawn from the petitions involved during the period between the time of the presentation to the county superintendent and the time they are finally filed with the officer. To hold that registered voters may change their minds or add their names during this period of time and at the same time hold that a qualified voter could not register and place his name on the petition during the same period of time would be inconsistent with the whole scheme and purpose of the statute. It is apparent to us that the date for both determinations should be the same, namely, the date of the filing of the petitions with the county superintendent. It would disenfranchise qualified voters who had not registered at the time of the presentment of the petitions (May 1, 1970). Such a policy would be contrary to and inconsistent with the designed purpose of the statute to permit and require a public hearing and to allow the qualified voters in the district to make a final judgment on the matter within 10 days after such hearing, and at any time before the fixed date of filing the petition with the county superintendent.

Since July 9, 1970, was the critical date, it becomes unnecessary to examine the factual determination by the county superintendent as to the eligibility of three different voters.

The judgment of the district court in this error proceeding affirming the judgment and findings of the county superintendent is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAMELA MARIE JONES, APPELLANT.

193 N. W. 2d 562

Filed January 14, 1972. No. 38057.

Criminal Law: Sentences: Appeal and Error. Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Stephen Greenberg, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The defendant was convicted of forgery. The sole question presented on this appeal is the excessiveness of the sentence.

The defendant, a woman 22 years of age, on the date of sentencing, was sentenced to imprisonment for an indeterminate period of 1 to 2 years for the crime of uttering a forged instrument. The record shows that the defendant in a short period of time contemporaneous with the particular offense to which she pled guilty, uttered and cashed about $600 worth of checks at various grocery stores, department stores, etc. The defendant used two different check books, one the defendant claims she found at a gas station and the second one a woman had left at a health spa. She "found" the purse and the check book in a lounge, and along with it was a billfold, a couple of dollars in change, and identification cards. The record reveals that some of the numerous checks which she issued were for necessities, such as food and clothing, and others were for luxuries. As a

part of a plea bargain, the record reveals that she will not be prosecuted upon any of the other checks involved in the $600 total, or any other offenses in connection with the check transactions.

The record reveals defendant was arrested in 1966 by the vice squad and forfeited bond of $10; an arrest for assault in 1967, no disposition shown; arrest for destruction of property in 1968, no disposition shown; an arrest for disorderly conduct in 1968, fine of $25 and costs; an arrest for petit larceny in 1968, fine of $10 and costs; an arrest for second offense petit larceny in 1969, sentence of 15 days in jail; an arrest for minor in possession in 1969, fine of $25 and costs; and an arrest in 1970 for unlawful entry, larceny, no disposition shown.

The circumstances of the present offense reveal the use of false identification papers, the stealing of a lady's purse, and other background facts which the district court took into consideration in making the determination of whether the defendant was entitled to probation.

The scope of our review is limited to the determination of whether the trial court abused its discretion in imposing the sentence it did. State v. Martin, 185 Neb. 699, 178 N. W. 2d 573; State v. Walker, 186 Neb. 439, 183 N. W. 2d 745. It is apparent that the trial court's determination the defendant was not a fit subject for probation, and the imposition of the minimum indeterminate sentence, was not an abuse of discretion.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TAYLOR BLACK BEAR, APPELLANT.
193 N. W. 2d 563

Filed January 14, 1972. No. 38058.

1. **Criminal Law: Evidence: Trial.** Evidence is sufficient to sus-

tain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

2. **Trial: Instructions.** Jury instructions must be considered collectively. If as a whole they correctly state the law, no error occurs, although one alone may be incomplete.
3. **Criminal Law: Guilty Plea: Plea Bargaining.** It is proper for the court to grant charge and sentence concessions to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would be served.
4. **Criminal Law: Sentences: Appeal and Error.** Unless an abuse of discretion appears on a claim of excessiveness, we will not disturb a sentence within statutory limits.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Albert T. Reddish, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found that Taylor Black Bear had uttered a forged check in violation of section 28-601, R. R. S. 1943. On appeal he asserts insufficiency of evidence, error in a jury instruction, and excessiveness of sentence.

The check, exhibit 1, and another check, exhibit 2, were forged by Foster Yellow Elk. On Monday, October 5, 1970, Marguerite Crouse, a checkout cashier at the Food Center in Alliance, cashed exhibit 2. The next day a male Indian presented exhibit 1 to Cora Pauley, also a checkout cashier there. She led the man back to John J. Essay, operator of the Food Center. Essay refused to cash the check which he retained, and he accused the Indian of the transaction the previous day. After departure of the Indian, Essay reported the matter to the police department, and police officers subsequently arrested Black Bear.

Neither checkout cashier could identify the offender.

Roger Roebuck, a bread salesman, had witnessed the transaction on Monday. He positively identified Black Bear, who had been intoxicated. Black Bear had been wearing exhibit 3, a "Viet Nam" jacket with the name "Spotted War Bonnet" lettered on the right front. Roebuck on two other occasions during this period saw Black Bear clad in the jacket. In Roebuck's opinion jackets of that type were not uncommon but he had not seen one exactly like exhibit 3.

Essay testified as follows: Black Bear was the Indian he had confronted on Tuesday. He identified him principally by the jacket. Black Bear had been intoxicated to excess. With bloodshot eyes, he had been staggering and weaving. When Black Bear departed, Essay trailed him half a block, then returned to the store and telephoned the police.

Ten to 15 minutes prior to receiving Essay's report, police officers Lyle L. Grant and Byron Fowler on patrol observed Black Bear, Yellow Elk, and two other Indians in a group a few blocks southeast of the Food Center. Black Bear was the only one who was sober. He said he intended to purchase groceries at the Food Center, walking away in that direction.

Essay described to police officers a man 6 feet tall, intoxicated, and clad in an army-type jacket with the words "Spotted War Bonnet, Viet Nam, Da Nang" lettered on it. After an interval of 15 minutes officers arrested Black Bear. He was sitting calmly in the window well at the front of a hotel that was in the process of demolition. The arresting officers were convinced of his sobriety. He was wearing exhibit 3, the only jacket of that type that either officer had seen in Alliance.

Black Bear, 5 feet 7 or 8 inches tall, testified as follows: He had not known the location of the Food Center. He had not seen either check prior to the arrest. On Tuesday, October 6, he had not been north of the hotel, the Food Center being located in that direction. No tes-

timony implied that someone had borrowed his jacket either day.

There were many other conflicts in the testimony of witnesses, not only among witnesses but also by an individual witness. The conflicts related to Essay's report to the police, purchases of merchandise by the offender each day, description of the jacket, and description of the physical appearance of Black Bear's face.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). Sufficiency of the evidence against Black Bear is a close issue. We resolve it against him.

The definition of "utter" in jury instruction No. 13 tracked our language in Crawford v. State, 164 Neb. 231, 82 N. W. 2d 1 (1957). Although instruction No. 13 did not refer to knowledge as such, in instruction No. 8 the statement of issues read in part: "That at that time the defendant knew said check to be falsely made forged and counterfeited."

Jury instructions must be considered collectively. If as a whole they correctly state the law, no error occurs, although one alone may be incomplete. State v. Davis, 186 Neb. 457, 183 N. W. 2d 753 (1971). Black Bear's complaint respecting the instructions is without merit.

The argument over the sentence is connected with the sentence imposed on Foster Yellow Elk. The court sentenced Black Bear to imprisonment for an indeterminate term of 1 to 4 years, and Yellow Elk, 6 to 18 months.

Yellow Elk had pleaded guilty, and the court stated that it considered the plea in sentencing him. Age 42, he had a record of three prior felony convictions, but the third one had occurred 14 years earlier. Black Bear, age 26, had a record of twenty misdemeanor convictions and four prior felony convictions. His fourth felony conviction had occurred approximately 4 years earlier.

It is proper for the court to grant charge and sentence

concessions to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would be served. A.B.A. Standards Relating to Pleas of Guilty, § 1.8, p. 8 (App. Dr., 1968).

Unless an abuse of discretion appears on a claim of excessiveness, we will not disturb a sentence within statutory limits. State v. Morosin, *ante* p. 521, 192 N. W. 2d 165. We have reviewed the presentence reports on Yellow Elk and Black Bear. The latter's sentence fell within the discretion of the trial court.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. In my judgment the evidence identifying the defendant as the utterer of the forged instrument is wholly insufficient to establish such identity beyond a reasonable doubt. This identification depends completely upon the testimony of John J. Essay. Neither cashier could identify the defendant as the man who attempted to pass the check. Essay identified only an Indian wearing a Vietnam jacket, who *was very intoxicated. His eyes were bloodshot. He was weaving and staggering. The officers who arrested the defendant within 5 to 15 minutes of the incident testified positively that the defendant was sober.*

This case does not present a question of mere credibility of the witnesses for the jury to decide. It is so inherently contradictory that the contradiction can be resolved only by speculation. We refer especially to the testimony as to the sobriety of the utterer and the defendant who was arrested. Where speculation and not reasonable inference must be resorted to there is no identification beyond a reasonable doubt.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ARMAND EDWARD MASON, APPELLANT.
193 N. W. 2d 576

Filed January 14, 1972. No. 38076.

1. **Criminal Law: Guilty Plea.** A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional.
2. **Criminal Law: Post Conviction: Attorneys at Law.** For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

John W. Carlson, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is a post conviction appeal from the overruling of a motion to vacate and set aside a conviction on a guilty plea. Defendant was accorded a hearing on his allegation of unlawful arrest, unlawful lineup, use of illegally obtained evidence, ineffective counsel, and the entry of a plea under a misapprehension of the case in which the plea was tendered, and consequently that the plea was not made knowingly, voluntarily, intelligently, and understandingly. We affirm.

A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. If, therefore, defendant's plea was understandingly and voluntarily made, he has waived his other alleged defenses except that of ineffective counsel. In view of the position we take on the record herein, we consider only the voluntariness of the plea and effectiveness of

counsel. In passing, however, we note the alleged improper confrontation is based upon United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, which was decided June 12, 1967. Defendant's plea was entered on April 27, 1967. Wade is not retroactive. Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. That defense was unavailable if defendant had gone to trial.

Defendant was arrested January 23, 1967, in Lincoln, Nebraska. With two others, Oziah and Hunter, he was charged in Gage County with robbery from the persons of Arlin F. Blome and Dorothy Blome, husband and wife. He was transferred to Gage County and on January 24, 1967, counsel was appointed for him. The facts of the robbery are described in State v. Oziah, 186 Neb. 541, 184 N. W. 2d 725. Defendant, on arraignment, pled not guilty. After Oziah's conviction and sentence of 15 years and Hunter's plea of nolo contendere and sentence of 12 years, defendant, who had a previous record, visited with his attorney about changing his plea from not guilty to guilty. This was done, and defendant was sentenced to 10 years in the Nebraska Penal and Correctional Complex.

Defendant's main contention is that he entered his guilty plea under a misapprehension as to the charge to which he was pleading. He now states he thought he was pleading guilty to the information for armed robbery of Dorothy Blome, when in fact he pled guilty to the information for armed robbery of Arlin F. Blome, both of which occurred in the same house at the same time. After the acceptance of his plea, the county attorney dismissed the information for the robbery of Dorothy Blome.

Defendant premises his claim for relief not on a claim of innocence but on his allegation that Arlin F. Blome's case was much the weaker one because of Arlin's failure to effectively identify him at the preliminary hearing. In this respect, defendant's testimony is in conflict with

that of his trial counsel. His trial counsel testified that Arlin F. Blome did positively identify the defendant but that in his opinion his cross-examination of Arlin F. Blome cast some doubt upon that positive identification. He also testified that he was not able to raise any doubt relative to Dorothy Blome's in-court identification of the defendant.

We find it difficult to believe that defendant had the slightest doubt as to the charge to which he pled guilty. The information was read to the defendant by the deputy county attorney. This information identified the offense as follows: "* * * feloniously and forcibly and by violence and by putting in fear, take from the person of Arlin F. Blome, money of value and property of value with intent to rob and steal." The following from the rearraignment proceedings should also raise a serious doubt as to defendant's present testimony: "THE COURT: Court will now ask you as to how you plead — DEFENDANT: (Interposing) Guilty, your Honor. THE COURT: Just a minute. (continuing) — as to how you plead to the charge in the for which allegation, that on January 22nd, 1967, in the County of Gage, State of Nebraska, defendant feloniously, forcibly and by violence and by putting in fear, take from the person of Arlin F. Blome money of value and property of value with the intent to rob and steal, guilty or not guilty? DEFENDANT: Guilty, your Honor."

It is noteworthy that defendant's motion to vacate and set aside sentence, which he drew himself, did not include this particular allegation. It was not until after counsel was appointed for the post conviction hearing, and counsel obtained leave to amend the motion, that this allegation was included. Defendant's trial attorney testified there was no question in his mind but that defendant was pleading to the charge of robbing Arlin F. Blome. In any event, even if Arlin F. Blome was weak on his positive identification of defendant, if defendant had been tried on that charge, Dorothy Blome's

testimony would still have been admissible against him. She was the one who opened the door when the defendant and his two accomplices forced their entrance into the Blome home.

The defendant has not proved that he was confused regarding the charge to which he was pleading. It is apparent that this is an afterthought because the other charge was dismissed after his plea was accepted. We find the record herein adequately demonstrates that defendant's plea was understandably and voluntarily entered.

Defendant now contends that his counsel was ineffective. The record indicates that his counsel had served 2 years as an assistant United States attorney in Alaska, and there had basic responsibility for criminal prosecutions. When he returned to Nebraska he was appointed as county attorney of Gage County and served in that capacity for 6 years. While most of his experience has been as a prosecutor, there can be little question he was familiar with criminal procedures. The rule is well established in this jurisdiction for post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Moss, 185 Neb. 536, 177 N. W. 2d 284. This definitely was not the situation herein. Defendant understood his position and was interested in obtaining as much consideration as possible on his sentence. He was sentenced to 10 years when the maximum sentence for the offense was 50 years. This was a lighter sentence than those received by his accomplices and in view of defendant's record, and the nature of the offense, a lenient one.

Defendant's motion to vacate was properly denied.

AFFIRMED.

ROBERT L. WESTENBURG, APPELLANT, V. CARROLL WEEDLUN, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

193 N. W. 2d 566

Filed January 14, 1972. No. 38081.

1. **Motor Vehicles: Administrative Law.** The revocation of a license to operate a motor vehicle under the point system is a ministerial act.
2. **Motor Vehicles: Administrative Law: Statutes.** When his records disclose that any person has accumulated a total of 12 or more points within 2 years, the Director of Motor Vehicles is required by section 39-7,129, R. R. S. 1943, to summarily revoke the license and privileges of such person to operate a motor vehicle in this state.
3. ———: ———: ———. The ministerial administrative authority vested in the Director of Motor Vehicles by the statute requires that he apply the applicable violation sections of the motor vehicle statute to the information properly furnished to him under the requirements of section 39-796, R. S. Supp., 1969.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

A. James McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

Pursuant to the authority of section 39-7,129, R. R. S. 1943, the motor vehicle operator's license of plaintiff was revoked by the Director of Motor Vehicles for the accumulation of 12 points within a 2-year period. Plaintiff appeals from an order of the district court sustaining the revocation. We affirm the judgment of the district court.

Plaintiff contends that the director exceeded his statutory authority in assessing 3 points for a speeding violation which took place July 12, 1970. Under the pro-

visions of subsection (11) of section 39-7,128, R. R. S. 1943, the number of points assessed for a speeding violation depends on the extent which the applicable speed limit was exceeded; 3 points are assessed only where the speed limit was exceeded by more than 10 miles per hour. The abstract of conviction for the violation in question indicates that section 39-723, R. S. Supp., 1969, was violated, and describes the offense as follows: "Speeding; 72 MPH. at night by Vascar." Plaintiff contends that it is not possible to tell from the abstract to what extent the speed limit was exceeded, and that consequently the director could assess only the minimum of 1 point, rather than the maximum of 3. Had less than 3 points been assessed, plaintiff would not have an accumulation of 12 points, and his license could not have been revoked.

Subsection (1) of section 39-723, R. S. Supp., 1969, sets out the various speed limits on highways and roads: "(a) seventy-five miles per hour upon any part of the National System of Interstate and Defense Highways or upon any freeway as defined in section 39-1369, (b) sixty-five miles per hour between the hours of sunrise and sunset, and sixty miles per hour between the hours of sunset and sunrise, upon any concrete, brick, macadamized, or other hard-surfaced highway, or upon any other highway that is part of the state highway system, or (c) fifty miles per hour upon any gravel, dirt, or other highway or road that is not hard surfaced, except upon any highway that is a part of the state highway system."

The abstract in question shows that the plaintiff was going 72 miles per hour "at night." It is apparent, therefore, that he was not on an interstate or other freeway, because speeds of 75 miles per hour are permitted night and day on such roads. For either of the remaining classes of roads with which the statute deals, a speed of 72 miles per hour at night would exceed the speed limit by more than 10 miles per hour, thus re-

quiring an assessment of 3 points against the driver's license of the offender.

The plaintiff contends that the director's power is purely ministerial and that, therefore, he is forbidden to indulge or apply the above analysis and interpretation. In other words, he says that the director's ministerial duties blind him from anything but the four corners of the above abstract. Of course, the duties of the director to assess points and to revoke licenses are ministerial. § 39-796, R. S. Supp., 1969; Lutjemeyer v. Dennis, 186 Neb. 46, 180 N. W. 2d 679.

The various statutes involved require the director to relate the reports of convictions in abstracts to the applicable law. He cannot, in performing his duty, assess the points in a void. A common sense reading of the statute, in light of the information supplied here, would lead to no other conclusion than that the director was required to assess 3 points for speed in excess of 10 miles per hour above the speed limit. The assessment of 3 points, therefore, was ministerial in nature only. It was neither necessary nor required that the court submitting the abstract recite the particular section of the statute applicable.

In Lutjemeyer v. Dennis, *supra,* this court rejected a contention that an abstract of conviction which described the offense as "violating auto signal" was insufficient because it did not specify that this had been done while driving a motor vehicle.

The contentions of the plaintiff are without merit. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES THOMPSON, APPELLANT.

193 N. W. 2d 561

Filed January 14, 1972. No. 38100.

Criminal Law: Sentences: Appeal and Error. Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The sole question presented by this appeal is the excessiveness of the district court's indeterminate sentence of not less than 5 years or more than 10 years in the Nebraska Penal and Correctional Complex for the crime of forgery. We affirm the judgment and sentence of the district court.

The record in this case shows that the appellant had a prior conviction for burglary. He admitted in open court that he had both escaped from jail and participated in the theft of an automobile. At the same time, charges were pending against the appellant for assault and battery and two further counts of burglary in Hall County, Nebraska. At the same time it appears that Keya Paha County had a warrant for the appellant's arrest for burglary which had not been served. It also appears that on a previous conviction the appellant had been unsuccessfully paroled therefrom. It further appears that the trial court in accepting the guilty plea and imposing the sentence, directed the dismissal of all

pending charges against the appellant, pursuant to a plea bargain.

The maximum sentence for the crime of forgery is a period of 20 years and a fine not exceeding $500. No rule of law is better established in this state than the one where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears. State v. Martin, 185 Neb. 699, 178 N. W. 2d 573. It is apparent, from the recital that we have made herein, that the district court did not abuse its discretion in imposing the sentence that it did under all of the circumstances.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

GEORGE ROSE SODDING & GRADING COMPANY, INC., APPELLANT, V. CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
193 N. W. 2d 556

Filed January 21, 1972. No. 37972.

1. **Trial: Evidence: Witnesses: Appeal and Error.** No formal offer to prove is required to obtain a review of a ruling of the trial court excluding the answer of a witness to a question, where the question itself clearly indicates what the party expected to prove by the witness.
2. **Trial: Trespass: Damages.** The failure to instruct the jury to return a verdict for nominal damages in an action for trespass, where the defendant admitted trespass, is error.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Frank Meares, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen Morrow, John Abbott,

Verne Vance, George Selders, and Kent Whinnery, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

WHITE, C. J.

By request for admissions, the defendant City of Omaha admitted pumping raw sewage onto plaintiff's property at least 6 times in the years 1968 and 1969. In this trespass suit, plaintiff alleged damages to trees and that plaintiff was put to the expense of using road grading equipment to remove the raw sewage that blocked the driveway.

The district court directed a verdict for the city because of failure of proof that any tree damage was proximately caused by the flow of the sewage. It refused to hear testimony on the issue of the reasonable cost and expense of the removal of the sewage from the plaintiff's driveway. We reverse the judgment of the district court.

Amidst a series of questions to the plaintiff concerning the value of the trees allegedly damaged by the sewage, the record reveals the following colloquy upon direct examination of plaintiff: "Q. BY MR. MEARES: How many hours did you spend grading after the sewage spilling? THE COURT: What was the question? MR. MEARES: Do you know how many hours you spent grading after the sewage—MR. STEIN: I will object to that as not within the issues. THE COURT: I will sustain the objection; not within the issues. MR. MEARES: I think that is in the Petition. Just bear with me a moment. Paragraph 7 of the Petition speaks of road grading. MR. STEIN: This is the value of the trees that you are asking. THE COURT: That is correct. The objection is sustained."

It is clear from the record that the above ruling of the court was based on the following exchange between plaintiff's counsel and the court during his attempt to prove tree damage: "Q. BY MR. MEARES: And what

is the value of those trees that you burned in '66? MR. STEIN: I will object to that as lack of proper and sufficient foundation, and also the conditions of the trees when he burned them; no evidence of valuation, and the condition also. THE COURT: Is it your theory that your damage is limited to the amount of trees *which have been burned;* is (this) your theory that you are proceeding under now? MR. MEARES: That were destroyed, yes your Honor. THE COURT: That is what you are proceeding on? MR. MEARES: *First the burning*—THE COURT: *Is that the theory?* MR. MEARES: *Yes.* THE COURT: I think you better lay a little more foundation." (Emphasis supplied.)

The plaintiff had attempted to prove the value of his trees at the time of the *planting.* Having difficulty, he attempted to show the value of *the trees* (nothing else) in the year some were pulled out *and burned.*

Further analysis is superfluous. A fair construction of counsel's statement is an admission that the tree damage claimed was limited to those that had to be burned. We find no indication whatsover of any abandonment of the entirely separate allegation of expense of removal of the sewage from his premises. To bar competent proof of this allegation was error, especially since general pleadings are to be liberally construed. State ex rel. Spillman v. Farmers State Bank of Adams, 115 Neb. 46, 211 N. W. 178; Paup v. American Tel. & Tel. Co., 124 Neb. 550, 247 N. W. 411.

There was no offer of proof, but the questions propounded fairly indicate what plaintiff sought to establish by the answers under the corresponding allegation of the petition. See Williams v. Fuller, 68 Neb. 354, 94 N. W. 118. See, generally, Comments, Offers of Proof in Nebraska, 43 Neb. L. Rev. 105 (1963); 88 C. J. S., Trial, §§ 73, 74, pp. 179, 180, 181. The limitations of the proof and the sustaining of the objection were reversible error.

We further point out, on remand, since the trespass was admitted, that the plaintiff was entitled to an award

of nominal damages. See Kochenthal v. Omaha & C. B. St. Ry. Co., 122 Neb. 244, 240 N. W. 295.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in result.

CLINTON, J., participating on briefs.

SIDNEY F. KEENAN, APPELLEE AND CROSS-APPELLANT, V. RACHEL SWIFT KEENAN, APPELLANT AND CROSS-APPELLEE.
193 N. W. 2d 568

Filed January 21, 1972. No. 38005.

Equity: Trial: Evidence: Appeal and Error: Witnesses. Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Wright, Simmons, Hancock & Hall, for appellant.

Van Steenberg, Winner & Brower, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a divorce action. Defendant appeals and plaintiff cross-appeals. Each claims the evidence justifies a decree of divorce on his or her part but is insufficient to sustain a decree for the other. Questions pertaining to the allowance of alimony are also presented. The district court found in favor of plaintiff but allowed temporary support money and permanent alimony. We

affirm the judgment of the district court subject to a minor modification.

Plaintiff was 71 years of age and a former rancher. He had known defendant, who was a resident of Arkansas, for many years. She was 63 years of age and a maiden lady. Plaintiff's first wife died in March 1969. He was in ill health, suffering from diabetes, arthritis, and an ulcer. He felt he needed someone to take care of him but was very reluctant to enter a nursing or rest home. In May he visited defendant in her home and was fully aware of its run-down condition and the circumstances under which she lived. He returned to Arkansas in December, became engaged, and the parties married on December 31, 1969.

He had given the defendant a $1,500 ring, loaned $1,400 to defendant's sister, gave defendant several presents, the sum of $500 the first month of the marriage, and $300 per month thereafter. He was importuned to repair the house but refused on the ground it was not worth the expense. He paid hospital expenses for defendant, but when she received insurance money covering these expenses, she retained it. He had retained his home in Nebraska and hoped to be able to spend part of each year there, but defendant was not amenable to this. The marriage was never consummated for which each holds the other responsible. Plaintiff concluded that defendant's primary interest was not in him, but in his wealth and what could be gotten from him. He returned to his Nebraska home on May 4, 1970, then returned to Arkansas with two sisters on May 9. Defendant was still unwilling to go to Nebraska with plaintiff. At that time he informed defendant he was leaving and sought to obtain his various items of property. His sisters were ordered out of the house and physically evicted. Plaintiff was forcibly restrained but got away in his automobile 3 days later on the pretext of going on some errands downtown. The evidence is conflicting and determination of the facts by the trial court must be given consideration.

"Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243.

Plaintiff made payments of $200 per month for 17 months for defendant's support and has paid $500 to cover defendant's expenses of litigation. During the short period of 4 months during which the marital relationship endured, defendant received at least $1,400, various gifts including a $1,500 ring, and an unspecified amount of insurance money. The decree awards her the further sum of $7,500 and taxes costs, including an allowance of $1,500 for attorneys' fees, to plaintiff. Defendant admitted when testifying that she was no worse off financially after the separation than before the marriage and considering all the circumstances, including the duration of the marital relationship, we find that she has been reasonably recompensed under the decree of the trial court.

The judgment of the district court is affirmed subject to the following. Plaintiff may withhold from the sum of $7,500, allowed as permanent alimony, the sum of $1,500 until such time as the personal property awarded to him, and now in defendant's hands, is delivered to him in Scottsbluff, Nebraska. Defendant is allowed the sum of $350 for the services of her attorneys in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. RAYMOND P. MEDLIN, JR., COUNTY ATTORNEY OF BOONE COUNTY, APPELLEE, V. GARY CHOAT ET AL., APPELLANTS, IMPLEADED WITH RICHARD MICHAELS ET AL., APPELLEES.
193 N. W. 2d 739

Filed January 21, 1972. No. 38012.

1. **Schools and School Districts: Statutes: Administrative Law.** A county committee for school district reorganization is not a governing body within the ambit of section 84-1401, R. S. Supp., 1969.
2. ———: ———: ———. Although the county superintendent of schools is a nonvoting member of the county school district reorganization committee, he must be included in the maximum number permitted by section 79-426.05, R. R. S. 1943.

Appeal from the district court for Boone County: C. THOMAS WHITE, Judge. Reversed and remanded with directions.

Wilson, Barlow & Watson, for appellant.

Raymond P. Medlin, Jr., and Perry, Perry & Witthoff, for appellee Medlin.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an action in quo warranto brought by the county attorney of Boone County, Nebraska, to void and set aside the election of the members of the Boone County Committee for the Reorganization of School Districts, and to oust all of the elected members from their offices on said county committee. The trial court found the election invalid and ousted the elected members from office. The respondents, Gary Choat, Marvin Richards, Mandy Rasmussen, and Melvin Furby, were the only respondents to answer and defend their right to the office to which they were elected. We reverse.

The election at issue was conducted at a meeting of all members of the school boards and boards of education

of Boone County on December 22, 1969. The meeting was called by the county superintendent, by notice to every elective member of said school boards or boards of education, who were the only ones eligible to vote for members of the reorganization committee. No special notice of any nature was given to the general public, but the meeting was open to members of the general public who wished to attend, and some were present. The trial court, holding article 14 of Chapter 84, R. S. Supp., 1969, and specifically section 84-1405 thereof, to be applicable, voided the election.

Section 84-1401, R. S. Supp., 1969, is as follows: "Except as otherwise expressly provided by the Constitution or the statutes of Nebraska, *all convened meetings of govering bodies of* all agencies, now or hereafter created by Constitution, statute, or otherwise pursuant to law, *of* the executive department of the State of Nebraska, *of* the independent boards, commissions, bureaus, committees, councils, subunits, *or* any other administrative agencies, whether advisory or executive, of the State of Nebraska, *or* of any political subdivision of the State of Nebraska, exercising legislative, executive, or administrative powers or supported in whole or in part by public funds or entrusted with powers of recommending the expenditure of, or actually expending, public funds shall be deemed to be a public meeting which shall be held in a public building except as provided in section 84-1402, and which shall be open in attendance to the public. Sections 84-1401 to 84-1405 shall not be construed to apply to any city having substantially similar requirements in its home rule charter or to the Legislature or any committee thereof." (Italics supplied.)

Section 84-1402, R. S. Supp., 1969, is as follows: "The public policy of the State of Nebraska is that all public meetings should be preceded by some publicized notice specifying the time and place of all such meetings in order that the citizens of the state can intelligently exercise their democratic privilege of appearing at public

sessions of governmental bodies. All such public meetings shall be held in the public building in which the governmental body conducting the meeting operates or is headquartered unless the publicized notice shall designate another public building or other place. The minutes of the governmental body, kept by the secretary or acting secretary of such body, shall record the manner by which such publicized notice was given."

We find the trial court was in error in holding these sections applicable to the election of the county committee for school district reorganization. A reading of Chapter 84, article 14, R. S. Supp., 1969, demonstrates that the obvious intent of that article is to provide for public meetings of all governing bodies. We do not agree that the school district reorganization committee is the type of body contemplated by the statute. It is not a "governing" body of any of the units or agencies embraced within the ambit of section 84-1401, R. S. Supp., 1969.

A more serious question concerns the regularity of the election procedures, which, because of his ruling on the public notice question, was not considered by the trial court. Section 79-426.05, R. R. S. 1943, as it existed on the date of the election, provided so far as material herein as follows: "There is hereby established in each county in the state a committee for the reorganization of school districts, to be known as the county committee. Each county committee shall be composed of not less than six nor more than ten members, no two of which shall be from the same district except in a county having fewer than six districts. The county committee of the county in which the schoolhouse or the administrative office of a joint district lying in two or more counties is located shall be designated to have within its jurisdiction the territory of said joint district for the purpose or organizing school districts. One member of the county committee shall be the county superintendent of schools, who shall serve as a nonvoting member of the committee. All of the members of school boards and boards of

education within the county and joint districts under the jurisdiction of that county committee shall, at a meeting called for that purpose by the county superintendent of schools within one hundred twenty days from August 27, 1949, and each four years thereafter, (1) determine by a majority vote of those present the number of members of the county committee within the limits prescribed in this section, and (2) elect for a term of four years all the remaining members of the committee other than the county superintendent of schools. A simple majority of the elective members of the county committee of counties in which the majority of districts are Class I school districts shall be chosen from Class I school districts with the remainder being chosen from other classes of school districts and with each class of school district having representation on the county committee. At least one of the elective members shall not be a member of any school board or board of education."

The minutes of the meeting of December 22, 1969, indicate that a motion was adopted to have a board composed of 10 members. This would mean, as we interpret the statute, the election of 9 voting members, who with the county superintendent, a nonvoting member, would constitute a committee of 10. Of the nine, at least one of the elective members could not be a member of any school board or board of education. A motion was erroneously adopted after the voting to declare the top 10 elected. The superintendent of schools then certified the election of 10, who with himself made a board of 11 members. While this procedure was irregular, it did not void the election of those properly elected.

The law provides that a simple majority of elective members of the county committee of counties in which the majority of districts are Class I school districts, which includes Boone County, shall be chosen from Class I school districts. The remainder of the board then must be chosen from other classes of school districts, but each class of school districts should have representa-

tion on the committee. In the instant case, one member was chosen from a Class III district, two members from a Class II district, and the remaining seven members certified from Class I districts. A simple majority of nine would be five. It is evident, therefore, that of the seven Class I members certified as elected, only the top five could legally be so certified. This means that only 8 of the 10 members certified as elected were properly certified, and because only 9 were to be elected, there is 1 vacancy on the committee to be filled as provided by law. If the other eight members are all members of school boards or boards of education, then someone must be elected from other than a Class I district who is not a member of a school board or board of education. In any event, the member to be selected must be from other than a Class I district.

The county superintendent assumed the board figure of 6 to 10 referred to in the statute meant elective board members. As set out heretofore, this was an erroneous interpretation. While the electors voted for 10 rather than 9 in this instance, it was merely an irregularity and in no way could have affected the result of the election.

The statute provides several limitations on the membership of the board, but does not delineate any particular method of conducting the election, so any procedures approved by the majority of the electors within the limits of the act would be permissible. In this instance, only the top five candidates from Class I districts could be elected. The four others were required to come from other classes, with each class having at least one member on the board.

The vote for the seven members of Class I districts certified, was as follows:

NAME	VOTES RECEIVED
Mel Furby	33
Bob Zoucha	29
Gary Choat	29
Mandy Rasmussen	27

Marvin Richards	25
Don Skillstad	19
Dick Michaels	18

Dick Michaels, who received 18 votes, and Don Skillstad, who received 19 votes, are the two who should not have been certified as elected. It is to be noted that the votes of those who were properly certified range from 25 to 33, substantially in excess of the two who should not have been certified.

The judgment of the district court is reversed and the cause is remanded to the district court with directions to vacate the election of Don Skillstad and Dick Michaels; to confirm the election of the remaining eight members; and to direct them to fill the vacancy for the ninth spot as provided by law.

REVERSED AND REMANDED WITH DIRECTIONS

STATE OF NEBRASKA, APPELLEE, V. EDWIN J. OLTJENBRUNS, APPELLANT.
193 N. W. 2d 744

Filed January 21, 1972. No. 38013.

1. **Searches and Seizures: Probable Cause: Arrest: Criminal Law.** In a warrantless search the controlling factor is whether the officer had reasonable grounds before the search to make an arrest; and in that connection the essential test is whether the facts available at the moment of the search would warrant a man of reasonable caution to believe that the action taken is appropriate. The existence of probable cause must be determined by a practical, and not by any technical, standard.
2. **Criminal Law: Evidence: Statutes: Motor Vehicles.** Under section 28-522, R. R. S. 1943, possession of a mini-bike without a certificate of registration is prima facie evidence of unlawful possession and concealment.
3. **Criminal Law: Searches and Seizures: Motor Vehicles.** When there are in plain sight within a motor vehicle materials which are indicative of a criminal offense, a subsequent search is justified and legal.
4. **Criminal Law: Statutes: Evidence.** Under section 28-522, R. R.

S. 1943, guilty knowledge may be established by circumstantial rather than direct evidence.

5. **Criminal Law: Statutes: Words and Phrases.** Concealment, within the meaning of section 28-522, R. R. S. 1943, simply means any possession of goods in such a manner as to keep them from the rightful owner and an intent to deprive the owner of his property.
6. **Criminal Law: Trial: Attorneys at Law.** The function of the prosecutor's opening statement is to generally state the nature of the case; and it is within the discretion of the prosecutor how much or how little to comment specifically upon the evidence to be offered.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

Richard E. Mueting, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a prosecution under section 28-522, R. R. S. 1943, for concealing a motorcycle with knowledge that it had been stolen, with the intent to defraud the owner thereof. From a jury conviction and sentence in the district court, the defendant has appealed. We affirm the sentence and judgment of the district court.

A mini-bike was stolen in a burglary of the Cleveland Farm Supply, an implement business, in Orchard, Nebraska, sometime between the closing of the business on the evening of July 9, 1970, and the early morning of July 10, 1970. The owner of the business, Vern A. Cleveland, testified that he was the owner of a mini-bike on July 9, 1970. He described his mini-bike and gave its serial number. The invoice, bill of lading, manufacturer's statement of origin, and the mini-bike were then received in evidence. Officer Calhoun identified the mini-bike as the same one found in the pickup truck operated by the defendant.

The defendant was operating a pickup truck, owned by him and one Ernest C. Aldrich, in an easterly direction on Omaha Avenue in Norfolk, Madison County, Nebraska, at approximately 4:50 a.m. in the early morning of July 10, 1970. At the same time, police officer Calhoun of Norfolk was at the intersection of Omaha Avenue and Logan Street in Norfolk, rerouting traffic around a house that was being moved. He stopped the pickup being operated by the defendant and advised him of the condition of the highway and that he would have to take a route through the town to get around the house which was being moved. Following this advice, the defendant proceeded to take the indicated route. As the defendant was making a turn to go north, the officer observed a number of items in the rear of the pickup truck, including the mini-bike owned by the Cleveland Farm Supply. It had been drizzling and raining that morning. The officer testified that the mini-bike was partially covered up. Besides the mini-bike, the officer observed as the pickup drove away from the point of original contact, a number of shotgun butts that were still bearing "manufacturer's tags." The evidence of ownership of the mini-bike was conclusive. Cleveland produced as evidence of ownership a bill of lading and an invoice and a manufacturer's statement of origin, the latter two bearing the same serial number which appeared on the mini-bike. The mini-bike was unused and was in Cleveland's shop for the purpose of sale. There is no evidence in the record of proof of ownership on the part of the defendant, no registration certificate, no invoice, no bill of sale, nor certificate of title.

After the officer had observed the partially covered mini-bike and the new shotgun butts with the manufacturer's tags on them, he became suspicious and followed the defendant on the route to which he had directed him. After the officer's observation of the above items in the rear of the pickup as defendant proceeded, the officer stopped the defendant and asked him for

identification, which the defendant supplied. The officer, after observing the contents of the pickup truck which we have described heretofore, informed the defendant that he was detained for investigation and took him to the police station. Other facts in connection with the arrest and the subsequent search of the pickup truck at the police station will be recited in the course of the opinion.

The defendant contends that the search was illegal and therefore the production in evidence of the mini-bike and the newly manufactured shotgun butts was erroneous and in violation of his Fourth Amendment rights. This court has had occasion to pass upon the applicable principles governing the determination of the validity of a warrantless search either with or without an arrest in many cases. We summarize by stating that we have held that in a warrantless search the controlling factor is whether the officer had reasonable grounds before the search to make an arrest; and in that connection the essential test is whether the facts available at the moment of the search would warrant a man of reasonable caution to believe that the action taken is appropriate. The existence of probable cause must be determined by a practical, and not by any technical, standard. State v. Harding, 184 Neb. 159, 165 N. W. 2d 723; State v. Goings, 184 Neb. 81, 165 N. W. 2d 366; State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129.

In this case we have the situation of the defendant, who was a complete stranger to the officer, operating a pickup truck in the early morning hours and bearing a registration and license from a location two counties distant from the scene of his observation, and at a time at which no business is normally conducted. As the vehicle moved away from the officer he could observe in the rear box of the pickup a number of new shotgun butts with the manufacturer's tags still on them, indicating that they were new, and a new mini-bike, which

were partially covered with some blankets or rugs. After making this observation the officer overtook the defendant for the purpose of further investigating what he had already seen in plain sight in the rear box of the pickup. From the record it is inferred that on the inspection of these objects which he had already seen, the officer determined, and it was a fact, that there was no certificate of registration for the mini-bike or any other proof of ownership to the objects observed. Section 28-522, R. R. S. 1943, provides that possession of a motorcycle without a certificate of registration to the possessor is prima facie evidence of guilt under the particular statute the defendant was prosecuted on. The officer having observed absence of any evidence of registration on the mini-bike, and lack of any indicia of ownership to it, was clearly entitled to act upon these facts which are prima facie evidence of guilt under the statute. No explanation of defendant's possession appears in the record. We point out further, as far as probable cause is concerned, that the possession by the defendant of a number of apparently new shotgun butts with manufacturer's tags on them is a highly suspicious circumstance. Directly pertinent is what we recently said in State v. Rys, 186 Neb. 341, 183 N. W. 2d 253, as follows: "There are numerous cases holding that when materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal."

Applying a practical, and not a technical standard, and realizing that a police officer is free to draw upon the general knowledge that he has developed in the course of his training and experience, and considering the totality of the circumstances, we have no doubt that the materials observed in the pickup, together with the other suspicious circumstances of the hour of the day and the foreign registration of the truck, were sufficient probable cause to justify the retention and the search. The

analogy to our holding in State v. Carpenter, *supra,* is quite obvious. There, as here, we were dealing with a motor vehicle from another county with a foreign registration that was observed at an early morning hour. And again, in the process of identifying the vehicle and the occupants, and without having already made any arrest, the police officers observed in plain sight certain objects (burglary tools) which gave the appearance of being tools of such a character as to be susceptible to use for burglary purposes; and, for the possession of which tools, the vehicle occupants offered no satisfactory explanation to the officers. We held in that case, on its facts, the officers were justified in making a subsequent search of the vehicle and, based upon the information acquired thereby, arresting the occupants. As we see it, this case is stronger than that of State v. Carpenter, *supra,* for the reason that the observation of the materials in this case discloses affirmatively that they were without registration or indicia of ownership and were, therefore, presumptively stolen. We therefore hold that the search and the arrest were with probable cause and there is no merit to this contention by the defendant.

The defendant contends that there was insufficient evidence of exclusive possession and his knowledge of the truck contents to sustain the conviction. Under the facts in this case the following from State v. Rys, *supra,* is applicable, wherein we said: "Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or *in an automobile possessed and operated by him,* the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence." (Emphasis supplied.) The evidence of the defendant's operation and the possession of the automobile is undisputed. There is no merit to this contention.

Defendant contends that there is no proof of his knowledge that the mini-bike was stolen. The answer is

that the very section of the statute under which the defendant is being prosecuted, section 28-522, R. R. S. 1943, makes the fact that the defendant had no registration for the mini-bike a presumption not only that he knew it was stolen but also that he is the one who stole it. Independent of the statutory presumption, there is no rule which requires that guilty knowledge must be established by direct evidence; rather, the element of guilty knowledge and intent may be established by purely circumstantial evidence. The facts herein recited coupled with the unexplained possession of recently stolen goods is sufficient circumstantial evidence upon which the jury may base a finding of guilty knowledge or intent. State v. Henry, 174 Neb. 432, 118 N. W. 2d 335; State v. Solano, 181 Neb. 716, 150 N. W. 2d 585; State v. Perez, 182 Neb. 680, 157 N. W. 2d 162.

The defendant next contends there was no evidence that he actually concealed the mini-bike, that being one of the elements of the offense under the statute, section 28-522, R. R. S. 1943. The defendant would have us interpret the word "conceal" out of context with the meaning and the purpose of the statute. It does not mean that there must be proof that the defendant literally and completely concealed both himself and the stolen articles from all public view. It simply means that he takes possession of the goods in such a manner as to conceal them from the rightful owner and deprive the owner of his property. Bailey v. State, 115 Neb. 77, 211 N. W. 200.

It is contended there is not appropriate evidence of ownership. He contends this because, apparently, the name of the complaining witness is not recited as the assignee in the manufacturer's certificate. Section 60-105, R. S. Supp., 1969, does not require this. All that section requires is that the owner have actual physical possession and that he have a title or a manufacturer's or importer's certificate. Both conditions exist here. Cleveland's oral testimony of the operation of the busi-

ness, the possession of the exact mini-bike, and the identification of the serial number of the mini-bike are sufficient evidence of ownership to justify the jury's findings in that respect. We observe also that along with the manufacturer's certificate there is in evidence the original invoice and the bill of lading to Cleveland which clearly establish ownership in the complaining witness.

The defendant contends that he is entitled to reversal because of error in the opening statement of the prosecution in that the prosecuting attorney failed and neglected to mention in it some of the essential elements of the offense charged. There is a conflict in evidence in this respect, but we do not resolve this conflict. The statute requires that counsel for the state *must* state the case of the prosecution and may briefly state the evidence by which he expects to sustain it. It contains no requirement that the prosecution must specifically enumerate all of the necessary elements of the offense. This contention is totally without merit.

The contentions of the defendant cannot be sustained. No prejudicial error appears in the record of this case. The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERMAN HOFFMEYER, APPELLANT.
193 N. W. 2d 760

Filed January 21, 1972. No. 38059.

1. **Trial: Words and Phrases: Witnesses.** A question is leading when it is so framed as to suggest to the witness the answer which is desired of him. Conversely, a question is not leading where it does not in any way indicate or suggest the answer desired.
2. **Trial: Courts: Witnesses: Criminal Law.** The trial court in a

criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question. The discretion is a legal one and subject to proper limitations.

3. **Criminal Law: Venue: Courts: Appeal and Error.** A request for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there is an abuse of such discretion.
4. **Criminal Law: Evidence: Trial.** As a general rule, evidence of other crimes is not admissible to prove the guilt of the defendant of the particular crime charged. There are exceptions, however, to this rule. Such evidence is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged.

Appeal from the district court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

George D. McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This is an appeal by Herman Hoffmeyer from a conviction for the crime of fondling a minor. Defendant admitted touching the sexual organs of an 8-year-old girl, but contends it was purely accidental and wholly unintentional. We affirm.

Defendant sets out 12 assignments of error, but discusses only 5 of them in his brief. In accordance with Revised Rules of the Supreme Court, 1967, Rule 8a2(3), defendant has limited himself to those discussed. In passing, we note that among the assignments not discussed is an allegation that the verdict is not sustained by sufficient evidence. We have carefully examined the record, and the evidence was amply sufficient to present a jury question.

The first assignment discussed by defendant is that the trial judge was not justified in permitting the asking

of leading questions. During the examination of a 14-year-old female witness, the prosecutor asked the following question: "Q. Let's stay with Paula and Debbie. Was there any conversation as to their panties?" Defendant's objection to the question as leading was overruled. We do not consider the question to be improper. In general, a question is leading when it is so framed as to suggest to the witness the answer which is desired of him. Conversely, a question is not leading where it does not in any way indicate or suggest the answer desired.

Our law is well settled that a trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question. The discretion is a legal one and subject to proper limitations. See State v. Burton, 174 Neb. 457, 118 N. W. 2d 502. As we said in that case, it is usual and proper for the court to permit leading questions in conducting the examination of a witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, or embarrassed while on the stand, and lacking in comprehension of the questions asked.

The second assignment of error discussed by defendant was the overruling of defendant's motion for continuance and change of venue because of an inflammatory letter or article which appeared in the "Vox Populi" section of The Hastings Daily Tribune the week before the trial. The letter relates to the molestation of the daughter of the writer and refers to the fact that within a week the man was out on bond and there was nothing that could be done about it. The editor of The Hastings Daily Tribune was called as a witness in defendant's trial. He testified that the letter had no reference whatever to the defendant. He further testified that of his own personal knowledge the person referred to in the "Vox Populi" letter was not the defendant.

The request for a change of venue in a criminal action

is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there is an abuse of such discretion. See State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775. In passing, we also observe that the defendant passed the jury for cause after he had a full opportunity to learn if any of them had read the article in question.

Defendant's third assignment of error is directed to the overruling of his motion for a mistrial when the 8-year-old companion of the prosecutrix, who was also involved on the occasion in question, testified as follows: "Q. What happened then, Paula? A. Well, he asked me to get on his lap, and I did, and then he asked me about the underwear. And after I told him, then he asked me if he could see my—between my legs. Q. What happened then, Paula? A. Well, he felt it. Q. Did he put his hands in your panties, honey? A. Yes. Q. Did he touch or rub it, honey? A. Yes." It is a general rule that evidence of other crimes is not admissible to prove the guilt of the defendant of the particular crime charged. There are exceptions, however, to this rule. Such evidence is relevant and admissible if it tends to prove a particular criminal intent, which is necessary to constitute the crime charged. See State v. Putnam, 178 Neb. 445, 133 N. W. 2d 605. This was a similar act, which occurred at approximately the same time, at the same place, and, in view of the defendant's defense of accidental or inadvertent touching, is relevant to show intent or motive. The jury was properly instructed that the evidence in question was received solely for the limited purpose of showing the intent or motive of the accused in the particular act charged.

Defendant's fourth assignment of error is directed to the sustaining of an objection to the following question he asked prosecutrix' mother: "Q. Have you in times past had occasion to warn Lisa not to take candy from strangers or get in the car with strangers, particularly strange men?" As an original question, defendant's con-

tention has merit. Here, it is nonprejudicial, or at best harmless error. Prosecutrix' mental state was not in issue, and the prosecutrix herself testified during cross-examination to exactly the facts which the defendant sought to elicit from her mother, so that the evidence was merely cumulative.

The last assignment of error discussed by defendant refers to the sustaining of an objection to the following question: "Q. Now, Mr. Hoffmeyer, I would like to have you tell this jury what your attitude and feeling is towards small children and towards small girls." The objection was sustained as not material nor relevant. Defendant was charged with indecently fondling a minor. Evidence of mens rea at the time of the act was admissible and defendant was permitted to testify about his mental state at that time. His attitude generally towards young children at other times was immaterial.

The judgment is affirmed.

AFFIRMED.

VERNON MIDDLEBROOK, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
193 N. W. 2d 572

Filed January 21, 1972. No. 38068.

Habeas Corpus: Probable Cause: Words and Phrases. Habeas corpus is a writ of right but not a writ of course, and probable cause for its allowance must be shown.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Vernon Middlebrook, pro se.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Vernon Middlebrook on January 20, 1971, petitioned for a writ of habeas corpus. He alleged that the warden had not allowed him certain credits on his sentence. The district court denied the writ. Middlebrook appeals.

Middlebrook asserts that we should determine his date of discharge to be January 8, 1973. The State points out that the warden has credited him with approximately 2⅔ months for county jail time. The dispute is probably at an end, but we place our decision on another ground.

Habeas corpus is a writ of right but not a writ of course, and probable cause for its allowance must be shown. In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673 (1949). Middlebrook had no judicial remedy, and rightly so.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LUGEAN R. MORGAN, JR., APPELLANT.
193 N. W. 2d 742

Filed January 21, 1972. No. 38095.

Criminal Law: Evidence. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Walter J. Matejka and J. Patrick Green, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

Lugean R. Morgan, Jr., was tried and found guilty of breaking and entering a dwelling. He received a penitentiary sentence of 4 to 8 years and this appeal followed.

At approximately 2 a.m., on August 21, 1970, Omaha police officers responded to a burglary-in-progress call and proceeded to 2614 North 33rd Street in Omaha, Nebraska. As one of the police cruisers arrived in an alley behind the house, the officers saw two people near the back door of the house. The couple ran from the back door with police officers in pursuit. Officer O'Connor lost sight of the fleeing man momentarily, but searched at the point where he disappeared, and found the defendant curled up in some weeds and grass. The defendant was found within 50 feet of the back door. Another police officer apprehended a woman in the immediate area immediately thereafter. The back door of the residence was open and the door frame showed signs of forced entry. A stereo record player, a window fan, and records were found in the backyard of the residence. A TV set was found in the open trunk of a Chevrolet car parked in the alley behind the house. All of these items were identified as belonging to Otis Keys, who resided in the house. The car in the alley belonged to an acquaintance of the defendant. The defendant admitted having borrowed the car on some previous occasions, but denied specifically having borrowed it that night. The defendant also admitted knowing the woman who was arrested at the same time he was.

The defendant's testimony was that he was walking down the street when he saw the police cruisers and heard a shot. Upon hearing the shot, he ran from the street and sought cover. The evidence establishes that a shot or shots were fired, but the record is entirely inconclusive as to who fired the shot and whether it occurred before, during, or after the flight of the couple from the back door of the house.

The defendant asserts that the evidence was insuffi-

cient to sustain the finding of guilty beyond a reasonable doubt. We cannot agree. While in some respects the evidence was circumstantial, it established a case almost as damning as if there had been an actual eyewitness to the specific act of burglary.

The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Escamilla, *ante* p. 457, 191 N. W. 2d 548; State v. Ortiz, *ante* p. 515, 192 N. W. 2d 151.

While the evidence of the State and the testimony of the defendant were in conflict, the jury resolved those conflicts against the defendant. The question of the guilt or innocence of the defendant was clearly for the jury to determine under proper instructions safeguarding the rights of the defendant. The evidence here is more than sufficient to sustain the jury's finding of guilt.

The defendant also contends that the trial court committed prejudicial error in giving an instruction concerning aiding and abetting. The evidence here was aimed at establishing the defendant's participation as a principal. Even if it be assumed that the instruction as to aiding and abetting was erroneous, it could not have been prejudicial to the defendant. See Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DECABOOTER WILLIAMS, APPELLANT.
193 N. W. 2d 570

Filed January 21, 1972. No. 38114.

Criminal Law: Sentences: Appeal and Error. A sentence within

the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas P. Lott, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant was charged with robbery under the provisions of section 28-414, R. R. S. 1943, found guilty by a jury, and sentenced to serve a term of not less than 3 years nor more than 10 years in the Nebraska Penal and Correctional Complex. He appeals. The sole assignment of error is that the sentence is excessive. The claim is founded upon the premise that the crime of which the defendant was found guilty was a first offense and that he is only 19 years of age.

The record discloses the defendant and a companion accomplished the robbery of a grocery store and its proprietor by an assault upon the person of the proprietor with a pair of scissors but without inflicting serious personal injury. Defendant was the active perpetrator of the assault which consisted of an attack from the rear, grabbing around the neck with the arm, choking, thrusting a pair of scissors against the back, and later striking several times. After being released the victim secured a revolver from a place of hiding and cocked it, and went toward the defendant, who then, according to the victim, rushed at him with the scissors as if to stab him. The victim then shot the defendant, inflicting a minor wound.

We have often said: A sentence within the limits prescribed by statute will not be disturbed in the absence

of an abuse of discretion. State v. Jurgens, *ante* p. 557, 192 N. W. 2d 741. We cannot say the record establishes an abuse of discretion.

AFFIRMED.

MID-AMERICA PIPELINE COMPANY ET AL., APPELLANTS, V. LELA BELLE WARREN, ADMINISTRATRIX OF THE ESTATE OF CHARLES WARREN JR., DECEASED, APPELLEE.
LELA BELLE WARREN, ADMINISTRATRIX OF THE ESTATE OF CHARLES WARREN, JR., DECEASED, APPELLEE, V. PANHANDLE CONSTRUCTION COMPANY ET AL., APPELLANTS.
193 N. W. 2d 749

Filed January 21, 1972. Nos. 38124, 38192.

1. **Master and Servant: Workmen's Compensation.** The general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.
2. ———: ———. It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing what the new master directs him to do he is performing his duty to the employer who gave the order. Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.
3. ———: ———. Before such new relationship can be made effective the servant must understand that he is submitting himself to the control of the new master.
4. **Appeal and Error: Evidence: Judgments.** If there is reasonable competent evidence to support the findings of fact in the

trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

Appeals from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Pilcher, Howard & Dustin and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

John J. Higgins of Eisenstatt, Higgins, Kinnamon & Green, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Two actions consolidated for trial purposes are involved here. In the first, the administratrix of the estate of Charles Warren, Jr., deceased, seeks to recover workmen's compensation from the Panhandle Construction Company, hereinafter referred to as Panhandle. In the second, Mid-America Pipeline Company, hereinafter referred to as MAPCO contends it was a special employer of Warren and, as such, liable under the workmen's compensation laws. Both companies carried insurance with the same insurer and the cases presented may be determinative of the right of the administratrix to bring an action for negligence against MAPCO.

The compensation court, and the district court on appeal, found Panhandle to be liable as a general employer and further found that MAPCO was not a special employer of Warren and was not liable for workmen's compensation. We affirm both judgments of the district court.

Panhandle had been engaged as an independent contractor in the construction of portions of an anhydrous pipeline for MAPCO but had no part in the construction of MAPCO's propane pipeline. In some instances the parties had written contracts for work to be done on a fixed-price basis. In other instances, Panhandle worked

under oral contracts on a cost plus 25 cents per foot basis. At the time of Warren's accident, Panhandle was delayed in its written contract work because MAPCO had right-of-way problems and in the interim Panhandle was performing miscellaneous jobs on a cost plus or cost basis.

On December 5, 1968, a break occurred in MAPCO's propane line north of Yutan, Nebraska. MAPCO did not have the men and machinery available to repair the break. It requested help from Panhandle. Required were a back hoe, a back hoe operator and oiler, a winch truck with driver, a welding outfit and welder, and a truck with a lowboy trailer to haul the back hoe. MAPCO supplied its own supervisor to oversee the work. Warren was a truck driver and the undisputed evidence shows that in connection with the pipeline break repair matter, his only job was to load the back hoe, haul it to the scene of the break, and unload it, then later to return it. Warren was, and had been for many years, an employee of Panhandle. He received directions from his superior to load the back hoe and take it to the scene of the break which would be identified by a MAPCO representative who also suggested the use of back roads in getting there. Warren drove to the scene of the break, then got into an automobile, for an unknown purpose, and rode into the field with the MAPCO supervisor. An explosion occurred and both were killed.

Apparently it was not unusual for Panhandle to assist MAPCO in small jobs of this nature and in such cases it billed MAPCO for extra work solely on a cost basis. This was done for the assistance rendered in connection with the propane line break. The invoice forwarded to and paid by MAPCO covered machine use, wages, social security, unemployment insurance, compensation insurance, etc. It may reasonably be inferred from this record that Panhandle, which received a considerable volume of contract work from MAPCO, was anxious to oblige MAPCO by assisting it in minor ways such as in

the case of the propane break and consequently performed this work on a cost only basis.

Under these circumstances was Warren at the time of his death an employee of Panhandle, MAPCO, or both? Panhandle was his general employer. A Panhandle representative informed Warren he had a trip he wanted Warren to make, directed Warren to get the truck, load the back hoe, and to contact the MAPCO representative, who thereafter explained to Warren the site or location of the break. It is evident that in taking the back hoe to the vicinity of the pipeline break, Warren was following orders received from his superior in Panhandle. Once at the scene his only remaining duty was to unload the back hoe and its operator would take it in charge. His duties were not such as to place him in the slightest degree under the orders of the MAPCO supervisor. Why he got into the supervisor's automobile remains in the realm of speculation.

The following excerpts from Shamburg v. Shamburg, 153 Neb. 495, 45 N. W. 2d 446, appear pertinent here. " * * * the general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired. * * *

"* * * 'It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing

what the new master directs him to do he is performing his duty to the employer who gave the order. * * * Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.'

"* * * 'Before such new relationship can be made effective the servant must understand that he is submitting himself to the control of the new master.' "

The record indicates that at all times Warren was following the orders of his general employer and was not subjected, either by his employer or himself, to the control of MAPCO.

Pertinent also is the following rule: "On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence." Gifford v. Ag Lime, Sand & Gravel Co., *ante* p. 57, 187 N. W. 2d 285. See, also, Bole v. S.M.S. Trucking Co., *ante* p. 341, 190 N. W. 2d 780.

The contention of Panhandle that it is not properly taxed with attorney's fees is based on its claim that it was not, at the time of the accident, the employer of Warren. In view of the foregoing, this contention is without merit.

The judgments of the district court are affirmed. Appellee is awarded an attorney's fee in the sum of $500 for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO W. CLIFTON, APPELLANT.
193 N. W. 2d 558

Filed January 21, 1972. No. 38155.

1. **Criminal Law: Guilty Plea: Constitutional Law.** When a defendant voluntarily and understandingly enters a plea of guilty

with full knowledge and understanding of a prior violation of his constitutional rights, the plea of guilty waives such rights.

2. **Criminal Law: Probation and Parole: Appeal and Error.** Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Leonard Dunker and Dean & Badami, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Defendant was charged in the trial court with operating on July 21, 1970, a motor vehicle while under the influence of alcoholic liquor and that this was his third offense.

On October 20, 1970, he appeared with his counsel, was arraigned, and entered a plea of not guilty. On November 24, 1970, through his attorney he moved to suppress certain evidence as follows: (a) Admissions of the defendant of drinking; (b) all statements made by the defendant after his arrest as well as and including all tests of a physical nature performed by the defendant at the requests of the officers; and (c) urine specimen. The sole grounds of the motion to suppress was the allegation that "The officers failed to advise the defendant of his right to counsel pursuant to . . . (citing authorities)." No other factual allegations of any kind were set forth in the motion. A hearing was held on the motion on November 27, 1970, at which time no evidence was presented but the following stipulation was entered into: "If the defendant, Leo W. Clifton, would testify he would testify that at the time of his arrest he was not given the Miranda warnings pursuant to the case of Miranda v. Arizona; . . . That if the police

officers, the arresting officers, were to testify they would testify they did not give the defendant, Leo W. Clifton, the Miranda warnings, nor did Mr. Clifton request an attorney." It will be observed that the stipulation is somewhat broader than the motion in that it encompasses not only the failure to advise of right to counsel but the much broader scope of all warnings required by Miranda. However, it is also to be noted it does not appear from the stipulation that at the time of the admissions, whatever they may have been, the defendant was in custody. Nor does the stipulation negative the possibility that the statements may have been volunteered and therefore not within the scope of Miranda. The trial court denied the motion to suppress.

Thereafter on February 1, 1971, the defendant appeared with his attorney and indicated to the court that he wished to waive a jury trial and be tried by the court. At that time the court explained to the defendant the effect of such a waiver. The defendant reiterated his desire to waive a jury trial.

On March 17, 1971, the defendant again appeared with his attorney and at that time asked leave to withdraw his plea of not guilty. The court by interrogation of the defendant determined he had not been incarcerated but had been out on bond; he had had every opportunity to talk to his lawyer that he wanted; he was fully advised concerning the withdrawal of the plea; and this is what he wanted to do. The court granted leave to withdraw the not guilty plea.

The defendant was rearraigned in the presence of his attorney. The information was read in full and the defendant, who reads English, followed along on a copy of the information as it was read. He was meticulously interrogated by the court as to whether he understood the charge. He said he did. He was asked how he intended to plead and he responded, "I am guilty." He was asked about the allegations of the two prior convictions of driving while intoxicated and he acknowledged

he had been twice convicted of the charge. The court carefully and fully explained to him all the rights which he would waive by a plea of guilty and what the effect of such a plea would be, including the fact the penalty for the offense was a term in the correctional complex for a term of 1 to 3 years. The court asked him whether any law enforcement officer had used any force, violence, or threats to make him plead guilty against his will. He acknowledged they had not. He likewise acknowledged no promises had been made to him to induce him to plead guilty. The court ascertained from the defendant that his counsel was retained privately, that counsel had advised him of his rights, and that counsel had performed satisfactorily as far as the defendant was concerned.

The court inquired of counsel as to whether he felt the guilty plea was voluntary and intelligently made and with awareness as to the consequences. The attorney answered affirmatively. The court put to counsel this question: "From your investigation of the facts, and your knowledge of the law, do you think the plea which he is making is consistent with the facts and the law as you know it?" The attorney answered: "Yes, sir, I do."

The defendant was asked how he pled to the information and he responded, "Guilty."

Presentence investigation was made and on April 28, 1971, defendant was again present with his counsel and was afforded the right of allocution which he declined to use. His attorney made a plea for probation. The court imposed sentence upon the defendant of 1 year's confinement in the penal complex, ordered him not to drive from the date of sentence until 1 year after he was discharged from his sentence, and revoked his motor vehicle operator's license.

The defendant appeals and assigns as error: (1) The overruling of the motion to suppress; and (2) the refusal of the court to suspend sentence and grant probation.

We affirm the judgment of conviction and the sentence.

A plea of guilty voluntarily and intelligently made waives any violation of known constitutional rights which may have preceded the plea. Here the plea was clearly voluntarily and intelligently made and the defendant and his attorney clearly knew of the failure of the police officers to give the Miranda warnings. For reasons best known to the defendant and his counsel he elected not to further assert his rights under Miranda in a trial below and if necessary in this court. There is nothing in the record to establish that the failure of the court to suppress (assuming but not holding that it should have been suppressed) the evidence induced the guilty plea. The record shows that admissions defendant may have made and results of the urine test were not used against him. His plea of guilty is under the circumstances here conclusive. State v. Cooper, 182 Neb. 765, 157 N. W. 2d 412; McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763.

Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed. State v. Jurgens, *ante* p. 557, 192 N. W. 2d 741. Section 29-2260, R. S. Supp., 1971, was not yet effective at the time of sentencing, but even applying its standards we cannot say there was an abuse of discretion. The presentence report shows a recent history of drunkenness, several moving traffic offenses in addition to the driving while intoxicated offenses, and one offense of malicious destruction of property. The trial court may well have concluded that repetition of the offense was probable or that incarceration was necessary or would be helpful in connection with the drinking problem.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN L. CAMPBELL, APPELLANT.

193 N. W. 2d 571

Filed January 21, 1972. No. 38210.

Criminal Law: Death: Appeal and Error. Death of defendant pending review on appeal of criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL and WALTER H. SMITH, Judges. Reversed and remanded with directions to dismiss.

Peter B. Beekman, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

Defendant was charged with the crime of operating a motor vehicle while his operator's license was under suspension. He was tried and convicted in the county court; he appealed to the district court where he was tried and convicted; and he appealed to this court. Prior to hearing of oral arguments here the defendant died. The death of the defendant makes the case moot and requires dismissal of the appeal. Stanisics v. State, 90 Neb. 278, 133 N. W. 412. However, the question arises as to whether or not the judgment of conviction which did not become final during the decedent's lifetime still stands. In the cited case the defendant died while the appeal was pending. The administrator of the estate sought to revive in the administrator's name to contest the validity of the conviction and to relieve the estate from liability for costs. The court seemed to assume that the estate would be liable for costs but held this was insufficient reason for a revivor. Practically all of

the federal courts and most of the state courts which have had occasion to consider the question hold that the death of the decedent pending appeal abates not merely the appeal, but also the proceedings had below in the prosecution from its inception and therefore the correct procedure is to vacate the conviction, and reverse and remand with directions to dismiss the indictment or information. Durham v. United States, 401 U. S. 481, 91 S. Ct. 858, 28 L. Ed. 2d 200; Annotation, 83 A. L. R. 2d 864; Annotation, 9 A. L. R. 3d 462, 496. We think, since at the time of the decedent's death there was no final judgment of conviction, the procedure held applicable in the last-cited authorities is the more consistent with principle. Further, there appears to be no sufficient reason to make a decedent's estate as distinguished from the decedent himself liable for costs of prosecution where there is no final judgment of conviction. The judgment of conviction is vacated and the cause is remanded to the trial court with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

NILE VALLEY COOPERATIVE GRAIN AND MILLING COMPANY, APPELLEE, V. FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, APPELLANT.
193 N. W. 2d 752

Filed January 28, 1972. No. 37940.

1. **Insurance: Contracts.** Objectively reasonable expectations of a beneficiary-insured regarding terms of his insurance contract ordinarily will be honored.
2. **Insurance: Contracts: Words and Phrases.** The applicable part of the "full reporting" clause in defendant's policy of provisional fire insurance issued to plaintiff is construed as follows: Liability is limited to that proportion of any loss which the last reported value bears to the actual value at the time of the re-

port, provided liability does not exceed the amount stated in the schedule endorsement of the policy.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

William B. Craig, for appellant.

Robert M. Harris, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

A fire destroyed plaintiff's "Taylor" building and contents which included fixtures temporarily removed from plaintiff's "Butler" building 40 feet away. Heat from the fire warped sides and the top of the Butler building. Plaintiff sued on two policies of fire insurance: (1) A standard policy which allegedly covered not only the Butler building but the fixtures also; and (2) a provisional policy relating to loss of personal property in the Taylor building.

After a trial to the court judgment went for plaintiff on each claim. Defendant appeals. It assigns for error (1) the allowance of damages for the fixtures under the standard policy; and (2) the amount of the award under the provisional policy which the court, according to defendant, erroneously interpreted.

In late June 1968 plaintiff began its annual cleaning of the Butler building preparatory to receipt of grain for storage. The work which lasted several weeks included (1) removal of partitions in the form of steel I-beams, and sliding panels that together formed walls for storage; (2) sweeping; (3) application of an exterminative spray; and (4) sealing of the building. Plaintiff stored the partitions and panels in the Taylor building to prevent exposure to moisture with consequent rust during the interval. The fire happened July 12.

The standard policy covered the Butler building "while located or contained as described in this policy," an

endorsement defining "building" to include bins. The endorsement permitted alterations, improvements, repairs, and "such use of the premises as is usual and incidental in the business conducted therein and all articles and materials usual and incidental to said business . . .."

Objectively reasonable expectations of a beneficiary-insured regarding terms of his insurance contract ordinarily will be honored. See, Funke Estate v. Law Union & Crown Ins. Co., 97 Neb. 412, 150 N. W. 262 (1914); Keeton, "Insurance Law Rights at Variance with Policy Provisions," 83 Harv. L. Rev. 961 at 967 (1970); cf. § 44-101, R. R. S. 1943. Expanding operation of the rule, we apply it to questions of coverage. The circumstances of this case relieve us of the burden of spelling out limitations. Defendant does not argue that temporary removal of the fixtures increased its risk. See generally Keeton,"Insurance Law Rights at Variance with Policy Provisions: Part Two," 83 Harv. L. Rev. 1281 (1970). The removal and the cleaning were normal business practices. The provisions of defendant's endorsement were liberal. Defendant incurred liability for loss of the fixtures.

The provisional policy contained a "full reporting" or "honesty" clause. Weeding out prolix and irrelevant provisions governing underreporting, overreporting, delinquent reporting, coinsurance and their consequences, we quote the policy: "Insurance is provided . . . for . . . coverages indicated below . . .. Amount $18,000 . . .. On Provisional Stock . . . (in Taylor building) Subject to . . . Form . . . 455 (11-63) . . . this Company . . . to an amount not exceeding the amount(s) above specified, has insured . . . (plaintiff) to the extent of the actual cash value of the property at the time of loss . . . against all DIRECT LOSS BY FIRE . . . (Form 455) (11-63) STANDARD PROVISIONAL STOCK FORM for . . . Warehouse Risks . . .. 1. On stock consisting of grain . . . seeds . . . and all other merchandise and supplies . . .. 2. . . . the amount of insurance . . . at any

time . . . shall be determined by . . . Paragraph 5. . . . 3. The insured . . . agrees to file with the insurer . . . a true statement . . . of the value (as defined in Paragraph 4) of the stock covered . . . as of the close of business on each Saturday . . .; and, if the insured so elect, such an amount or addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value . . .. 4. . . . wherever the term "Stock" is used . . . it shall . . . include all property covered . . . as described in Paragraph 1 . . .. 'Value' . . . shall apply in the manner set forth in . . . (4a) . . . at the time when such ascertainment of value is required by the conditions of this policy: (4a) The value of stock . . . shall be the cost of replacing such stock . . .. 5. The amount of Insurance . . . at any time . . . shall be determined by following the formula set out in . . . 5A . . . and 5E. Section 5A. As of the time at which insurance in force is to be determined, ascertain the value as defined in Paragraph 4 . . .. Section 5E. 1. If the amount determined by . . . 5A . . . is less than the 'Limit . . .' named in the 'Schedule Endorsement' . . ., the amount thus determined shall be the 'Amount of Insurance under this form.' . . . SUPPLEMENTAL COVERAGES . . . Debris Removal: . . . this insurance covers expenses incurred in the removal of all debris . . .. However, the total liability under this policy shall not exceed the amount of insurance in force under this policy at the time of loss . . .."

Plaintiff's last report, dated July 6, 1968, and timely, valued the stock at $6,500, or 100 per cent of actual value. It listed, however, only flour and feed at $6,000 and seed at $500. Plaintiff omitted to value other stock in a space on the form, overvaluing flour, feed, and seed. Loss of the listed items in the fire amounted to $4,416.50, and of other merchandise and supplies $2,866.11, or a total loss of $7,282.61. The cost of removing debris was $200. Plaintiff claimed a loss of $6,700 including the $200 item which the court allowed.

Defendant argues that plaintiff, in not itemizing its stock, underreported so as to limit its recovery to $4,416.50, the loss of reported items.

Insurers in many instances require such reports only to ascertain value. "The premium cost must be measured in relation to the . . . value which actually falls within the protection of the policy at various times during its term. Hence, it is essential that the actual amount of premium be determined at the end of the policy year instead of at the beginning, and some way must be devised to determine retroactively how much value had been insured . . .. Practicality dictates that the value of stock be determined at convenient intervals but with sufficient frequency . . . to provide a fairly accurate reflection of the over-all amount of exposure to which the coverage had been subjected." Cotton, "Metered Fire Insurance—A Survey of the Reporting Form Fire Policy," 1958 Ins. L. J. 217 (1958).

In defendant's policy time frames concerning stock reports and losses are ambiguous. The applicable part of the policy is interpreted as follows: Liability is limited to that proportion of any loss which the last reported value bears to the actual value at the time of the report, provided liability does not exceed the amount stated in the schedule endorsement of the policy. Plaintiff having reported 100 per cent of the value in its latest and timely report, defendant incurred a liability of $6,700. The judgment was correct. See, American Eagle Fire Ins. Co. v. Burdine, 200 F. 2d 26 (10th Cir., 1952) (Murrah, J.); Hanover Insurance Co. v. McLoney, 205 F. Supp. 49 (D. C., E. D. Ky., 1962); but cf. Columbia Fire Ins. Co. v. Boykin & Tayloe, Inc., 185 F. 2d 771 (4th Cir., 1950); Aetna Ins Co. v. Rhodes, 170 F. 2d 111 (10th Cir., 1948).

Other assignments of error are not well taken. The judgment is affirmed. For services of counsel in this court we allow plaintiff $500. See § 44-359, R. S. Supp., 1971.

AFFIRMED.

NEWTON, J., dissenting in part.

The majority opinion holds that plaintiff may recover the value of certain fixtures temporarily removed from the Butler building and stored in the Taylor building. These fixtures consisted of I-beams and sliding panels which were normally affixed to and formed part of the Butler building. Also included in this category is an aeration fan used as a blower to aerate grain stored in the building and normally affixed to the Butler building as a part of it. These fixtures were not removed from the Butler building for the purpose of making "alterations, improvements, and repairs to any building" as authorized by the policy which extended coverage under such conditions. They were removed solely to facilitate cleaning of the building.

Each of the two buildings was separately covered in the same policy. The fixtures mentioned were integral parts of the Butler building and insured as such. Had they remained in the Butler building, they would not have been damaged. The policy is not ambiguous and clearly does not extend coverage to fixtures removed from the building for cleaning purposes.

It is intimated that the following clause—"Permission granted for such use of the premises as is usual and incidental in the business as conducted therein and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require, * * *"—extends the Taylor building coverage to these fixtures. This cannot be as these fixtures were not "usual and incidental" to the business conducted in that building. Furthermore, *full recovery* has been otherwise had as to the Taylor building coverage and unless the amount for which that building and its contents is insured is increased by judicial fiat, it cannot afford coverage for these fixtures.

To state that coverage is afforded because the insured expected to have such coverage when the policy clearly does not afford it simply means that the insured

can disregard the clear terms of the policy and rewrite it to suit itself. An unambiguous contract is not subject to change by construction. "A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract." G. Bartling & Co. v. Harris Truck Lines, Inc., 175 Neb. 465, 122 N. W. 2d 243. See, also, Hazuka v. Maryland Cas. Co., 183 Neb. 336, 160 N. W. 2d 174.

I would disallow plaintiff's claim as to these fixtures.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. GENEICE ROSENBERGER, APPELLEE.
193 N. W. 2d 769

Filed January 28, 1972. No. 38002.

1. **Public Lands: Improvements: Constitutional Law: Statutes.** A tenant on school lands has a compensable interest in the nature of a property interest in "improvements" covered by statute and placed by him on such lands prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent declaration of unconstitutionality of such a statute for lack of due process.
2. **Public Lands: Improvements: Statutes: Landlord and Tenant.** In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" compensable under the lease statutes.
3. **Public Lands: Improvements: Landlord and Tenant.** The value of a tenant's interest resulting from "improvements" on school lands is required to be determined prior to sale of the land.
4. **Public Lands: Improvements: Trusts.** Title to the school lands of this State is held in trust for the benefit of the common schools and the State is required to administer them as trust property, subject to the rules of law applicable to the handling of trust estates.

Appeal from the district court for Box Butte County: JOHN H. KUNS, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellant.

Daniel Stubbs of Stubbs & Metz, for appellee.

McGinley, Lane, Mueller, Shanahan & McQuillan, John A. Gale, and Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The Board of Educational Lands and Funds of the State of Nebraska brought this action under the provisions of section 72-240.11, R. S. Supp., 1969, for a declaratory judgment to determine the ownership of certain permanent "improvements" placed on a section of school land located in Box Butte County by the lessee of the land at his expense. The district court determined that the defendant lessee was the owner of the "improvements" and the Board of Educational Lands and Funds has appealed.

The defendant, Geneice Rosenberger, was the holder of leases covering a section of school land located in Box Butte County, Nebraska. She acquired the leases upon the death of her husband in 1959. The leases were initially for 25 years, commencing January 1, 1942, and had been extended for the years 1967 and 1968. The particular "improvements" set out in the petition and involved in the dispute were an irrigation pump and well, and land leveling.

The petition alleged that the irrigation pump and well was a replacement of a bad well drilled in 1951. The date of replacement was uncertain. The evidence shows permission of the Board of Educational Lands and Funds for an additional irrigation well in 1954. The decree of the district court refers to two irrigation wells. The evidence is confusing as to the identification of any particular well as to the date of installation and we shall,

therefore, assume that the irrigation pump and well in dispute here was placed on the land prior to 1953 and without direct written permission of the board.

All of the land leveling was done between 1948 and 1953 and was done without specific written permission of the board. The record does indicate that an agreement with the Soil Conservation Service as to the leveling was agreed to by the board. Costs of all wells and land leveling was paid solely by the lessee.

Same historical background is essential. Almost since the beginning of statehood there have been statutes regulating the leasing of the public school lands of the State. These lands comprise several million acres. Until recently, the State never assumed any of the costs of "improvements" on the school lands but, instead, our statutes encouraged the lessees in making "improvements" to these lands. The interests of the lessees in such "improvements" were protected by statutes which required a new lessee to pay the old lessee for his "improvements." In case of dispute as to value, the value was to be determined by a board of appraisers, subject to a right of appeal to the courts. All improvements put on leased public land are required to be assessed to the owner of such improvements as personal property. § 77-1209, R. R. S. 1943.

From time to time the Legislature defined "improvements." Those statutory definitions had little regard for the technical niceties of common law nor its definitions. Generally they made no distinctions between "improvements" which are severable from the land and those which became an actual part of the land itself and could never be severed. Neither did the Legislature make any distinctions between trees, crops, or plowing for future crops. Presumably, the Legislature intended to provide compensation to lessees for placing on the land something which would be separately valued upon termination of the lease, and that in itself added value to the land.

This court, in 1966, accurately stated: "The statutes on their face declare a compensation policy that has been uninterrupted for almost 50 years." Banks v. State, 181 Neb. 106, 147 N. W. 2d 132.

With this background, we turn to a consideration of the relevant cases dealing with the issues now before us. That record begins in 1955 with Watkins v. Dodson, 159 745, 68 N. W. 2d 508. The "improvements" statute involved included growing crops and the crop in controversy was wheat. The appraisement of "improvements" was conducted as required by statute and the new lessee paid the amount of the appraisal to the county treasurer. The old lessee filed an appeal from the appraisal but proceeded to harvest the wheat. This court held that the statute providing for appraisement of the value of the "improvements" and payment for them by the new lessee was unconstitutional because it failed to provide for notice and hearing to the owner of the property (the old lessee). The court clearly held that the interest of the old lessee in the "improvements" was a property right which entitled the former tenant to procedural due process before he could be deprived of the interest. It therefore held that the 1947 version of the improvement appraisal statute still in effect in 1952, was unconstitutional.

In Mara v. Norman, 162 Neb. 845, 77 N. W. 2d 569 (1956), the old lessee had made improvements which were appraised under the statute declared unconstitutional in Watkins, and the amount of the appraisal was paid to the county treasurer. Following the release of the Watkins opinion, the county treasurer refused to pay the amount of the appraisal to the old tenant but paid the amount into court. The amount paid for the crop, however, was returned to the new tenant, since the old tenant had harvested it. The district court found that the old tenant was entitled to the appraised sum for other improvements, but on appeal this court apparently determined that since the statute dealing with the ap-

praisal of improvements was unconstitutional, neither tenant could rely on it as the source of recovery. The court, however, again clearly recognized that the old tenant had an interest in the "improvements" and gave him permission to amend his pleadings to have determined whether or not "his improvements" had been taken and converted by the new lessees and if so, their value.

In 1966, following the passage of a statute providing for sale of the school lands, this court decided the case of Banks v. State, 181 Neb. 106, 147 N. W. 2d 132. In that case, we specifically held that a tenant on school lands has a property interest resulting from improvements made prior to September 14, 1953, notwithstanding the unconstitutionality of an appraisal and compensation statute that otherwise would be a source of his interest. That holding applied to "improvements" made before there was any requirement of approval by the state board, but the case also held that land leveling done without permission after September 14, 1953, was not compensable because of the statutory change which was effective on that date, requiring prior approval of improvements by the state board. The Banks case also specifically held that in the event of a sale of school lands to a third person under the provisions of the 1965 sale statute, a tenant has a right to compensation resulting from improvements compensable under the lease statutes, and that the value of the tenant's property interest resulting from improvements on school land is required to be determined prior to the sale of the land. That case is fully determinative of the issues here and without question requires affirmance of the judgment in this case.

In 1970, however, State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599, was decided. That case involved a quonset building erected by a tenant without permission after September 14, 1953. The court did not refer to Banks although it determined, as Banks had determined

before it, that "improvements" made without permission *after* September 14, 1953, became the property of the State and could not be removed. The position of the court in Bardsley was that because the appraisal portion of the 1947 "improvements" statute was unconstitutional, therefore all prior statutes containing the same provisions were also unconstitutional and all such statutes were complete nullities. Therefore, it was stated that only the common law applied and lessees obtained no interest in any "improvements" under any "improvement" statutes. The clear implication of Bardsley as to pre-1953 "improvements" was that the lessee had no interest in such improvements, either a property interest or a compensable interest, solely because Watkins had declared the 1947 appraisal portion of the statute unconstitutional for lack of notice and due process. Such a conclusion would either remove the sole basis for the finding of unconstitutionality in Watkins, or would itself result in an unconstitutional taking of property without just compensation. The court relied upon the common law rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee in the absence of an agreement, express or implied, or a statute indicating otherwise, citing Blomquist v. Board of Educational Lands & Funds, 170 Neb. 741, 104 N. W. 2d 264.

Even assuming that the statutes for more than 50 years were unconstitutional for lack of due process in taking the property of the lessee tenants without notice, they at least constituted an agreement, express or implied, or an indication and commitment by the State that the lessee of school lands had a compensable interest in "improvements" placed on the school lands by the lessee in reliance on the statutes.

To the extent that State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599, holds that a lessee of school lands has no interest except a common law interest in "improvements" placed on such lands without specific written

permission prior to September 14, 1953, it is overruled. The holding in Banks v. State, 181 Neb. 106, 147 N. W. 2d 132, is reaffirmed and readopted.

A tenant on school lands has a compensable interest in the nature of a property interest in "improvements" covered by statute and placed by him on such lands prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent declaration of unconstitutionality of such a statute for lack of due process.

In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" compensable under the lease statutes. Banks v. State, *supra*.

The value of a tenant's interest resulting from "improvements" on school lands is required to be determined prior to sale of the land. Banks v. State, *supra*.

It is quite clear that title to the school lands of this State is held in trust for the benefit of the common schools and that the State is required to administer them as trust property, subject to the rules of law applicable to the handling of trust estates. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520.

Beneficial interests of the educational trust in the school lands must of necessity be fully protected. Theories and standards of valuation of such intermingled interests have posed problems and obscured the basic issue. At the termination of the lease, or any later valuation date, the fair market value of the land should be determined as if none of the authorized "improvements" had been added. The fair market value of the land with the improvements on it should then be determined as of the same date. The difference is the value added to the land by the compensable improvements. The compensable interest of the tenant in "improvements" is limited to the value of the "improvements" so determined, or the actual cost of the "improvements" furnished and paid for by the tenant, whichever is less.

The judgment of the district court here determined that the defendant lessee was the owner of all of the "improvements" and declared her ownership. That judgment, within the limitations set out in this opinion, was correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the decision of the court in this case for the reason that I cannot be a party to the rape of the school land trust. I concede the legislative intent to grant rights to lessees in the improvements, but question the power of the Legislature to grant an interest of any nature in the land.

In this case, as in the Banks case, we are not concerned with rights as between lessees, but rather with the question whether a trustee may grant rights to the detriment of a cestui que trust. It is the law of trusts which should be controlling herein, and not the intent of the legislation.

It is undisputed that no request was made nor permission granted to place improvements on the land previous to 1954. Previous to that time there was no statute dealing with the rights and obligations as between a lessee of school land and the Board of Educational Lands and Funds with regard to permanent improvements placed upon the school lands by a lessee. In such situation, under the provisions of section 49-101, R. R. S. 1943, the common law applied. Under the common law, permanent improvements placed on real estate by a lessee without the consent of the landlord became the property of the landowner. It is also of interest to note that after the installation of the irrigation wells the lessee sublet the leased property to other lessees.

As set out in Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653: "The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alien-

ate the lands or any part thereof except as allowed by the Enabling Act and the Constitution."

The majority opinion holds improvements on leased property create a property right. I have no quarrel with that holding if it is restricted to property rights in the removable improvements. However, I am in complete disagreement that land leveling, irrigation wells, and like improvements create a property right in other than those portions which conceivably can be removed, and to so hold would necessarily create a property interest in the land itself. This is beyond the power of the Legislature to grant, and is a direct violation of the school lands trust to the detriment of the common schools, the cestui que trust.

Over the years, the school land trust has been manipulated by the legislative process for the advantage of school land lessees, and to the detriment of the trust, by inadequate rental returns. The legislation under consideration, as construed by the majority opinion, is an extreme manipulation for the benefit of school land lessees, and is an obvious encroachment upon the trust itself.

The law applicable herein is well stated in State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520: "A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of his powers. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. The rule is no different in the leasing of property of a trust estate."

In that same case, we said: "The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself. * * *

"That the Legislature has the power to provide the method of administering the public school lands of the

state as a trust is not subject to question. But the method provided must be one which is within the law governing the administration of trust estates. The designation of these lands as a trust in the Constitution has the effect of incorporating into the constitutional provision the rules of law regulating the administration of trusts and the conduct and duties of trustees. A breach of trust in such a situation is in effect a violation of the constitutional provision and has the effect of invalidating the legislation authorizing the breach."

It seems elementary to me that in dealing with this trust a strict interpretation must be placed upon all statutes, agreements, and proceedings for the protection of the beneficiaries of our public school lands. This fact, it appears to me, has been wholly ignored by the Banks case and the majority opinion herein. I have no quarrel with these holdings when interpreting rights between lessees. As I interpret the improvement statutes, they refer to *authorized* improvements, and contemplate, and I believe can only contemplate, the relationship between the old and the new lessees. The statute is so limited. To extend them, as was done by the Banks case and is done by the majority opinion herein, is to ignore the trust nature of the property, and to read into the statute a grant which is beyond the power of the Legislature to give. In the first instance, the State merely serves as an intermediary between the old and the new lessees. I cannot accept any interpretation that grants lessees any land benefits as against the trust, for the simple reason that the Legislature is without power to create or grant such benefits. What the majority opinion does is to diminish the value of the school lands by considering the State as a new lessee rather than as a trustee. To me this is not only judicial legislation but legislation in violation of a constitutional prohibition.

WHITE, C. J., and NEWTON, J., join in this dissent.

ROBERT L. HODGSON, APPELLANT, V. VERNON GLADEM, APPELLEE.
193 N. W. 2d 779

Filed January 28, 1972. No. 38009.

Automobiles: Negligence: Trial. A driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law.

Appeal from the district court for Boone County: C. THOMAS WHITE, Judge. Affirmed.

Jewell, Otte, Pollock & Gatz, for appellant.

Kenneth H. Elson and James D. Livingston, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This action arises from a collision which occurred on May 27, 1969, between two motor vehicles at an intersection of two county roads. The plaintiff prayed for damages caused to his vehicle by the collision. Defendant filed a cross-petition asking recovery for personal injuries and damages to his vehicle. At the conclusion of all the evidence the defendant renewed an earlier motion for a directed verdict against the plaintiff on the grounds of plaintiff's contributory negligence. The plaintiff moved for the dismissal of the defendant's cross-petition on the grounds of the defendant's negligence. The court found both parties guilty of negligence more than slight as a matter of law and dismissed both the petition and cross-petition. The plaintiff appealed to this court. We

affirm the judgment of the district court. We have noted the date of the accident to indicate that it occurred prior to the repeal of section 39-728, R. R. S. 1943, but by so doing do not mean to imply that the result would necessarily be different if such repeal had occurred before the accident date.

There is no significant dispute in the evidence. The roads in question were unpaved but graveled. The intersection was not protected by stop signs or other traffic controls. At the time of the collision it was daylight, clear, and dry. The plaintiff's vehicle, a pickup-type truck carrying a mobile veterinary clinic, was traveling in a westerly direction on the east-west road. The plaintiff was a passenger in his own vehicle which was being driven by an employee. The defendant's vehicle, a passenger car, driven by him, was northbound on the north-south road. Each was in its own proper lane of traffic. The intersection was, insofar as it pertains to these two drivers, a "blind intersection." The view of each as to the approach of the other was completely obstructed by an embankment and a shelterbelt of trees, consisting of plum brush and cedars at least 6 to 8 feet tall which could not be seen through. The obstruction extended along the south of the east-west road to about the fence line east of the intersection. The shelterbelt extended east from the intersection and neither driver could see the other at any time in their approach to the intersection.

The plaintiff testified that his vehicle was traveling 40 to 45 miles per hour as it entered the intersection. His driver had decelerated without application of the brakes as they approached the intersection and they had been traveling at about 45 miles per hour. Plaintiff saw the other vehicle an instant before the collision. At that time his truck was already in the intersection. He estimated the speed of the other vehicle when he saw it at 50 miles per hour and that this vehicle was perhaps 20 feet south of the intersection when the plain-

tiff's vehicle entered it. The defendant's vehicle struck that of the plaintiff in the "left door and the left side of the mobile clinic." The plaintiff had traveled the road in question before but not for about 2 years. He did not warn his driver to slow down because it was a blind intersection. His driver told the plaintiff after the collision that he did not remember seeing the other vehicle before the impact.

The plaintiff's driver testified they were traveling "Forty to forty-five" miles per hour. He had been over the road before but not for a couple of years. He described the shelterbelt along the fence line. He decelerated 150 feet from the intersection. He stated that the edge of the trees was about 5 to 10 feet from the intersection. He did not remember seeing the other vehicle. He admitted that he had told the defendant when they were in the hospital after the accident that he did not see the defendant's vehicle before the impact. He did not remember applying the brakes before the collision. He looked to the south when the vehicle was a a little past the shelterbelt. He saw nothing. He could see 1,000 feet south down the road.

The defendant testified that the north-south road on which he was traveling was a more traveled road than the east-west road; that the posted speed limits on the north-south road are 50 miles per hour. He described the shelterbelt and stated that the embankment on which it was located was about 4 feet high. One could not see through the trees. He was going about 45 miles per hour as he approached the intersection and he thought he slowed by deceleration as he approached. He saw the plaintiff's vehicle before the collision but realized at that time there was nothing he could do to avoid it. He did, however, apply his brakes. He estimated he saw the plaintiff's vehicle when his own was about 30 feet from the impact. He knew the intersection was a blind one. He did not know which vehicle entered the intersection first.

The sheriff of Boone County who investigated the accident testified. His only testimony of consequence was that the defendant's vehicle left 15 feet of skidmarks just before the impact. The skidmarks were south of the intersection about 20 feet.

Pictures of the intersection and the area at the southeast corner thereof were introduced into evidence, but it is not possible from them to draw any firm conclusions as to the exact distance in feet each may have been from the intersection when he could have first seen the other. It could be concluded, however, that the radius of vision was a little more than indicated by the testimony of the plaintiff's driver.

It is evident of course the plaintiff had what is usually referred to as the directional right-of-way. A jury could have found the plaintiff's vehicle entered the intersection slightly ahead of that of the defendant. A jury could also have found the plaintiff's driver looked to the south at about the time the plaintiff's vehicle entered the intersection, but saw nothing even though, under the facts here, the other car had then to be almost at the intersection.

It is equally evident both drivers approached a blind intersection at about the same time and at such a rate of speed that neither could take any effective action to avoid the accident when he first saw or could have seen the other.

The plaintiff argues that the question of his contributory negligence, if any, and its comparison with that of the defendant presented a question of fact for the jury to decide. He cites and relies upon the following propositions of law. If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is for the jury. Before a verdict can be directed against a motorist for failing to see an approaching automobile at an unprotected intersection, the

approaching automobile must be undisputedly in a favored position.

One of the cases cited by the plaintiff is Sanderson v. Westphalen, 178 Neb. 298, 133 N. W. 2d 16. In that case the plaintiff and defendant occupied the same relative positions they do in this case, that is, the plaintiff was traveling west and the defendant north. The significant difference, however, is that in the cited case each had a clear view of the approach of the other for about 700 feet. The plaintiff in that case, although failing to see the approach of the defendant's vehicle at the time he actually looked, could expect to be seen by a driver approaching from the south and therefore have his directional right-of-way respected. In this case neither could see the other until almost in the intersection. Sanderson v. Westphalen, *supra,* is not applicable here.

The underlying purpose of right-of-way rules is, of course, to prevent collisions and they must be applied, together with the other applicable rules relating to the exercise of due care, in such a way that if the rules are observed they will tend to have this result.

In the case of an intersection with a completely obstructed view, known to be such by the drivers, there are only two alternatives which can have the desired effect. Either the driver of the automobile not having the directional right-of-way must approach the intersection at such a speed that he can observe down the favored road and can stop if necessary before entering and crossing and the driver on the right be deemed to have an absolute right-of-way and have no duty whatever to keep a lookout to his left, assuming he is traveling within the prima facie lawful speed limit, or both drivers must approach the intersection at such speed that each may effectively exercise an option on how to proceed as may be indicated by circumstances when they reach a point where they can see. The latter we believe is the more acceptable principle.

The court has never held that the driver on the right,

on approaching an intersection at about the same time as the one on the left, has an absolute right to proceed regardless of the circumstances. The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with underlying purpose of the rules.

In Barajas v. Parker, 165 Neb. 444, 85 N. W. 2d 894, where the plaintiff had the directional right-of-way at an intersection where the view was obstructed to her left and the other car was approaching from that direction, this court said: "In this case the testimony of plaintiff discloses that the plaintiff did not look in the direction from which the defendant was approaching. This, in the light of the facts and law, amounted to contributory negligence more than slight. It was her duty to look for approaching automobiles and to see those within the radius that denoted the limit of danger. See, Evans v. Messick, supra; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

"This radius was narrowly limited in the present instance but this could not be a basis for departure from the rule. The ground area itself apparently did not prevent a view of the intersection from ¾ mile to the south and almost ¼ mile to the west. The view however from the south to the west and from the west to the south of the intersection was obstructed by a hedge or row of small trees of a height estimated by witnesses to be from 12 to 30 feet. Vision through the hedge was difficult. The hedge was about 25 feet south of the east and west road. The east end was 42 feet west of the east edge of the north and south road. The radial area was not otherwise described." (Emphasis supplied.)

In Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, a city street intersection case, this court held that the trial court erroneously directed a verdict against the

plaintiff who had the directional right-of-way. The plaintiff looked before entering the intersection and a jury could have concluded the defendant was not in the radius of danger. In that case this court said: "The general rule governing the type of case at bar is that when the injured party fails to look at all, or looks straight ahead without looking to either side, *or is in such a position that he cannot see*, or, in other words, when he takes no precaution at all for his own safety, it is usually a question for the court." (Emphasis supplied.)

A car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because he is on the right of the other car. His favored position and the right to proceed arising thereunder may be forfeited because of excessive speed under the circumstances. See Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 140, 125 N. W. 2d 556, cited by the plaintiff.

In this case the undisputed facts show the plaintiff approached a blind, unprotected intersection where he could not see to the left until almost at the intersection and where he had to realize that any car approaching on his left at whatever speed could not see him until it was almost in the intersection, and he did so at a speed which left him no alternative but to enter the intersection irrespective of whatever his observations might disclose when he reached a position where he could see to his left. Under these circumstances he was guilty of contributory negligence more than slight as a matter of law in that he took no precautions whatever for his safety. We hold that a driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely ob-

structed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law. The trial court's determination was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICKY RANDALL, APPELLANT.
193 N. W. 2d 766

Filed January 28, 1972. No. 38035.

1. **Criminal Law: Trial: Courts: Instructions.** In the absence of a request for a cautionary instruction with relation to previous similar offenses, it is not error for the trial court to fail to give such an instuction.
2. **Criminal Law: Infants: Kidnapping: Parent and Child.** The gist of the crime of child stealing is the malicious, forcible, or fraudulent removal of a child from the custody of its legal custodian, with the intent to unlawfully detain or conceal it from such custodian or parent, and consent of the child is immaterial and does not constitute a defense.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Lovell, Raymond & Hippe, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is a prosecution for child stealing of Diana Kuntz, a child 11 years of age, with the intent to unlawfully conceal the child from her parents. The defendant was convicted by a jury, sentenced by the court, and appeals therefrom. We affirm the judgment and sentence of the trial court.

Diana Kuntz, the prosecuting witness, testified that she was 11 years of age on January 14, 1971; that she was a slight acquaintance of the defendant, Ricky Randall; and that she met him, had driven around with him, and spent the day of January 14, 1971, with him. Her testimony establishes that Diana and the defendant, along with others, left in a motor vehicle, traveled to the States of Wyoming and Montana for a period of 3 days, and later Diana was returned to the home of her parents. The trial court admitted evidence, over objection, that during the period of time Diana and Randall were in Wyoming they engaged in sexual intercourse; and that they shared a room together at Newcastle, Wyoming. The court also admitted evidence as to an incident of sexual intercourse between Diana and the defendant in Montana.

Summarizing the evidence of the State, it is substantially undisputed, as the defendant so states in his brief, it shows that the defendant, Randall, Diana Kuntz, and two other parties left Scottsbluff, picked up a girl in Morrill and took a trip in the defendant's car from there westerly through Wyoming, where they left one man at Newcastle, then into Montana, and back into Wyoming, over a period of 3 days. The evidence also substantiates the undisputed fact that Diana Kuntz had given her consent to the trip.

The evidence shows that the defendant did not return Diana Kuntz to her parents. The law officers did. The evidence also reveals as undisputed the testimony of Diana Kuntz' father about a phone call that he engaged in with the defendant, while the defendant and Diana were on the trip in question. It is as follows: "Q. Did you hear the conversation that occurred when Diana apparently handed the phone to someone named Rick to speak? A. Yes. Q. And what conversation did you hear at this time? A. He identified himself as Rick Randall and then I spoke up and asked him where they were at and he wouldn't give me no answer then, but

we kept talking to him, and then he told me that they were married and they was going to go to Arizona to live, and I kept talking to him and I said, 'Where are you at, in South Dakota?' And he said, 'Yes, we're in South Dakota.' And I said, 'Rapid City?' He said, 'Yes.' And I said, 'Are you going to bring my daughter home?' Well, he said, 'If you drop all charges and everything,' he says, 'I'll bring her home.' And I said, 'I don't have nothing to do with that,' I says, 'You just bring her home,' and I says, 'We'll be waiting for you tomorrow and you bring her home.' Well, he said, 'I'll think of it.' And we kept talking and I don't know all just the words that we said, but we—where they landed up, I believe that they went up to South Dakota and got married, but they wasn't even in South Dakota; they were in Rock Springs, Wyoming. Q. Did you specifically request that he return your daughter to your home? A. Yes. Q. What did he respond to your request? A. He said, 'If you drop all charges.' "

The main assignment of error is that the trial court erred in failing to instruct the jury, by way of a cautionary instruction, that the evidence relating to crimes committed by the defendant outside the jurisdiction of Scotts Bluff County were received for the limited purpose of showing the intent of the defendant to conceal the child from her parents. There are two answers to this contention. First, there is no showing of the commission of separate independent crimes by the defendant. The circumstances of staying at the hotel, and engaging in sexual intercourse, and the facts surrounding the 3-day trip, were all part of the chain of events and the circumstances that began with the defendant's departure from Scottsbluff, Nebraska, and finally led to his capture in Rock Springs, Wyoming. Very simply, they were not separate and independent other crimes, they were simply the essential facts of the case directly bearing on the defendant in taking 11-year-old Diana with him and away from her parents. Second, the de-

fendant tendered no instruction bearing upon this issue. In the absence of a request for a cautionary instruction with relation to previous similar offenses, it is not error for the trial court to fail to give such an instruction. Taylor v. State, 114 Neb. 257, 207 N. W. 207; Buckley v. State, 131 Neb. 752, 269 N. W. 892.

The second assignment of error charges that it was error for the trial court to advise the jury that the consent of Diana Kuntz, age 11, was immaterial. This court has held that the gist of the crime involved here is the malicious, forcible, or fraudulent removal of a child from the custody of its legal custodian, with the intent to unlawfully detain or conceal it from such custodian or parent, and hence consent of the child is immaterial and does not constitute a defense. The fact that the child consented to leave her parents and go with the accused is immaterial. Bundy v. State, 114 Neb. 121, 206 N. W. 21. There is no merit to this contention.

The defendant contends that the trial court should have instructed the jury on the lesser included offense of contributing to the need for special supervision of a minor as defined in section 28-477, R. S. Supp., 1969. The trial court refused this request and it was without error. The answer to the defendant's contention is found in State v. LaPlante, 183 Neb. 803, 164 N. W. 2d 448, wherein this court very recently said as follows: "Defendant's last assignment of error is the failure of the trial court to instruct on the offense of simple assault. Such an instruction is not mandatory where the evidence is conclusive of the guilt of the defendant. Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586; Moore v. State, 147 Neb. 390, 23 N. W. 2d 552. Further, in Davis v. State, 116 Neb. 90, 215 N. W. 785, this court stated the general rule in the following language: 'Such an instruction is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense. If the evidence is such as to warrant only a verdict of the greater offense, or one of not

guilty, then it is not proper to give such an instruction.' See, also, In re Application of Flanders, 119 Neb. 761, 230 N. W. 684; Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. The evidence in the present case is such that defendant is either guilty of the crime charged or not guilty. The trial court did not err in failing to instruct on the lesser offense."

Without reiterating the testimony we recited at the beginning of this opinion, the evidence in this case is conclusive of the guilt of the defendant of the crime charged. We observe that the evidence in this case is of such a conclusive nature, almost wholly undisputed, as to warrant only a verdict of guilty of the greater offense. We feel that the evidence herein is so conclusive against the defendant that to submit the instruction on contributing to the delinquency of a minor to a jury would have been unconscionable under the circumstances. It not only was not mandatory to give the instruction but it was the only way, considering the nature of the evidence in this case, in which the trial court could have fairly and properly submitted the case to the jury. The assignment of error is without merit.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. SHONKWILER, APPELLANT.
194 N. W. 2d 172

Filed January 28, 1972. No. 38097.

1. **Criminal Law: Sentences: Probation and Parole.** A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.
2. ———: ———: ———. A statement by a defendant before sentencing that the Viet Nam war is immoral and that if drafted

he would not bear arms in that war does not constitute a justifiable reason for refusing probation to an otherwise qualified defendant.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Reversed and remanded with directions.

Mitchell & Beatty and Jerome J. Ortman, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant, David L. Shonkwiler, pleaded guilty to burglary in the district court for Dawson County, Nebraska, and was sentenced to not less than 1 nor more than 2 years in the Nebraska Penal and Correctional Complex. The defendant has appealed on the ground that the sentence imposed was an abuse of discretion, was arbitrary and unreasonable, and was excessive under the circumstances.

A codefendant, Melvin Lee Anderson, was an equal participant along with the defendant in the commission of the burglary involved here. Both of these young men were 19 years of age. Both were first offenders. Both pleaded guilty. Both were convicted at the same time and both were sentenced at the same time. Both made full financial restitution. Melvin Lee Anderson was placed on probation for a period of 2 years. David L. Shonkwiler received a 1 to 2 year penitentiary sentence. Upon motion in this court, the presentence investigation report was made a part of the record.

The burglary occurred on the 30th day of April 1970, some 2 weeks after the defendant became 19 years old. He was sentenced on February 19, 1971. At the time of sentencing, the defendant had completed three semesters at Kearney State College. He held various jobs and for all practical purposes was putting himself

through college. He lived in Kearney with one of two older brothers, both of whom were also attending Kearney State College. His father was a minister and member of the Berean Fundamentalist Church, and is now a teacher at the Montana Institute of the Bible in Billings, Montana. His mother is a school teacher in Billings. The defendant has one sister who, with her husband, is a missionary in Mexico City. In addition to his two older brothers, he has one younger brother living with his parents in Montana.

Complete restitution of $129.67 had been made for the burglary. All but $18.35 of this amount was for a broken window and damage to the back door of the tavern involved. The conviction here was the defendant's first felony conviction. His only prior conviction of any kind was a $15 fine for littering in the City of Kearney on March 20, 1970. His record in high school and in college was good and he had had no problems with school authorities.

At the time the guilty pleas were taken and the matter referred to the probation office for presentence investigation, the court advised both young men that they should be completely honest with the probation officer. The defendant Shonkwiler was. In addition to matters which will be referred to later, Shonkwiler advised the probation officer that the same two young men had broken windows in two establishments and obtained some merchandise from a third, all on the evening of March 13, 1970. Restitution was also made for all of these incidents, although no charges were ever filed. The codefendant Anderson advised the court at time of sentencing that he did not advise the probation officer of the March 13th incidents because he didn't think they would find out that he was in on it and conceded that he was less than truthful. The same probation officer made the presentence investigation and report on each of the two young men and recommended both of them for probation.

Without going into the details of the presentence investigation report as to Melvin Lee Anderson, it showed that he was also a first felony offender but that he had several minor misdemeanor convictions while defendant Shonkwiler had only the one. Anderson had even been convicted on a misdemeanor count in Broken Bow, Nebraska, and fined $100 in August of 1970, while he was free on bond on the charge involved here. It should also be sufficient to state that in all other factors relevant to probation, the record of David L. Shonkwiler as revealed in the presentence investigation reports, was at least as good, if not better, than that of his codefendant.

The record discloses that the basis for the difference in sentencing of the two young men stemmed from the defendant's comments as to the Viet Nam war and his obligation for military service in that war. Shonkwiler expressed to the probation officer and to the court his conviction that the Viet Nam war was immoral and stated that he would refuse to bear arms in Viet Nam. The trial court interpreted his comments as a statement that he would not obey the laws of the United States; referred to him as an outlaw; and refused to entertain any additional testimony as to the nature and extent of his conscientious objections. The trial court proceeded on the assumption that any valid, legal conscientious objections must rest on religion.

The defendant Shonkwiler had a draft status of II-S, a student deferment, and his draft number was 182. With that number, it is uncertain whether he would be drafted under current conditions. Shonkwiler attempted to explain that he would not bear arms in any war, but would serve in any other way if he could; that he did not mean to disobey the United States laws; and that his beliefs, he thought, were within the definition of "conscientious objector" laid down by the Supreme Court. This court takes judicial notice of the fact that there are multiple avenues of establishing conscientious objection, and multiple avenues of service legally avail-

able as an alternative to the military duty of bearing arms.

"A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary." ABA Standards Relating to Sentencing Alternatives and Procedures, Standard 2.3(c). The affirmative reasons justifying total confinement set out in the Standards are inapplicable here. The Advisory Committee for the ABA Standards, as well as the Model Penal Code, section 7.01, take the position that the starting point for every sentence should be probation or some other sentence not involving commitment or confinement. Particularly is this true in the case of first offenders and even more so when those first offenders are youthful. See commentary to Standard 2.3(e), pp. 72, 73, ABA Standards Relating to Sentencing Alternatives and Procedures. The district court clearly recognized these principles when it placed Melvin Lee Anderson on probation. The court, however, withheld similar treatment from the defendant Shonkwiler.

At least as early as 1905, this court expressed its view that where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced. See Keeler v. State, 73 Neb. 441, 103 N. W. 64. The law still continues to strive for even-handed justice. A statement by a defendant before sentencing that the Viet Nam war is immoral and that if drafted he would not bear arms in that war does not constitute a justifiable reason for refusing probation to an otherwise qualified defendant.

The order of probation entered with respect to the codefendant Anderson contains as one of its provisions

the condition that the defendant "shall not violate the ordinances of any municipality, the laws of any state or the laws of the United States." This is virtually a standard requirement of any probation order. Even if the statement here amounted to a declaration that the defendant would violate the law if ordered to bear arms in Viet Nam, he may never be faced with the prospect. If he were on probation and did violate the law in the future, it would constitute an immediate violation of the conditions of his probation as well as constituting a separate violation of the laws of the United States. While the defendant's attitude toward bearing arms in war may be abhorrent to some citizens, the law must and does extend its protection to conscientious objectors. The defendant and every other citizen is also guaranteed the constitutional right of free speech. The defendant's attitude toward the Viet Nam war has been publicly expressed by many thoroughly loyal American citizens and in no way reflects criminal tendencies. Neither does it furnish a justifiable basis for refusing probation under the circumstances present here.

The sentence of the district court is vacated and the cause is remanded to the district court with directions to place David L. Shonkwiler on probation under the same terms and conditions contained in the probation order of February 19, 1971, covering the probation of Melvin Lee Anderson.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., took no part in the consideration or decision in this case.

SPENCER and NEWTON, JJ., concur in the result only.

STATE OF NEBRASKA, APPELLEE, V. DONALD GEORGE ELROY MCDONALD, APPELLANT.
194 N. W. 2d 183

Filed January 28, 1972. No. 38099.

1. **Criminal Law: Trial: Confessions.** The trial court's finding

that an in-custody statement of an accused is voluntary must appear from the record with unmistakable clarity.

2. ———: ———: ———. To be admissible, a confession must be free and voluntary, that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
3. **Criminal Law: Trial: Confessions: Courts: Instructions.** It is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary.
4. **Criminal Law: Trial: Attorneys at Law: Fees.** It is not proper to allow an attorney's fee in criminal cases only for time spent in trial, and refuse to make any allowance for time or services reasonably and necessarily required and performed prior to trial.

Appeal from the district court for Adams County: FRED R. IRONS, Judge. Reversed and remanded.

Brock & Seiler, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant McDonald was found guilty by a jury of the crime of burglary and was sentenced by the court to 3 to 5 years imprisonment. The principal issue on appeal involves the admissibility of an in-custody statement obtained from the defendant.

The evidence implicated the defendant and another individual named Barada. While the defendant was in custody prior to trial, he was interviewed by the county attorney in the presence of a court reporter. The complete constitutional rights warnings were given to the defendant and he waived those rights. In response to preliminary questions, he stated that he "didn't do it." After some discussion of other indirectly related matters, the questioning was brought back to the particular burglary involved. After a couple of questions and an-

swers involving Barada's connection with the premises burglarized, the following dialogue occurred: "(Def.) Can we go off the record for a minute? (Co. Atty.) Well, I can't go off the record once we start but you may go ahead. (Def.) Well, I want to ask you this question: What are you going to do with me on this if I tell you the whole thing. It will implicate me. It is a fringe deal and it's like that dope deal. (Co. Atty.) Well, nothing happened to you on the dope deal, is that right? (Def.) Well, I am not asking you to make a deal or anything. I wanted your line of thinking because I did have hold of some of the stuff that he did get. (Co. Atty.) Some of the cash? (Def.) Well, the cash, no. (Co. Atty.) Well, tell me everything you know. * * *." The remainder of the statement accused Barada of the burglary but conceded that the defendant knew Barada was committing a burglary and that defendant received some of the proceeds.

During the trial, at a hearing outside the presence of the jury, the court reporter testified as to the statement taken from the defendant. The court reporter also testified that he had previously taken statements of the defendant about his activities in selling "dope" and the court reporter did not know of any charges brought against the defendant relating to those statements. Objections were made to the admission of the defendant's statement here on the ground that the statement was inadmissible because it was made as a result of an implied promise or inducement and therefore involuntary. The court overruled the objections but made no specific finding of any kind. The statement was thereafter introduced and read in full to the jury.

Under the procedures required by Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, the court must first make a judicial determination as to the voluntariness of a statement or confession by the defendant before permitting the jury to hear the alleged statement or confession. The trial court's finding that an

in-custody statement of an accused is voluntary must appear from the record with unmistakable clarity. Sims v. Georgia, 385 U. S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593; State v. Holland, 183 Neb. 485, 161 N. W. 2d 862.

"To be admissible, a confession must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). See, also, State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66.

Where the question of the voluntariness of an oral or written confession is in issue, the court must properly instruct as to what constitutes a voluntary confession, whether requested or not. It is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary. State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161.

Here the court instructed with respect to the required constitutional warnings and with respect to knowing and intelligent waiver of constitutional rights by giving N J I No. 14.52A. N J I No. 14.52 instructs as to when admissions or confessions may be considered as evidence of guilt and it also outlines the required findings the jury must make with respect to statements procured or induced by promises directly or indirectly made by persons in authority. That instruction was omitted. No similar or related instruction was given. The failure of the trial court to give this instruction amounted to a withdrawal of the issue of voluntariness from the jury's consideration and requires reversal. State v. Breaker, *supra*.

Since this case must be retried and the issues of inducements and promises and the voluntariness of statements be submitted to the court and jury, we point out that law enforcement officers should make sure that no promises are made which offer the defendant a benefit

or advantage which is dependent upon the defendant making or executing the statement or confession sought. County attorneys in particular should make certain that their position is unequivocal and forthright. We recognize the inherent problems in reconstructing factual situations in many cases and the obvious tendency of some witnesses to have convenient memories. In this case however, the facts as to what occurred at the time of taking the defendant's statement are not in dispute.

The defendant also asserts that the $450 attorney's fee allowed here was not reasonable. The complaint is that the court failed to allow a minimum hourly rate for the total number of hours spent, and that the established pattern for criminal cases in the district allows $150 per day for jury trial, with no allowance for preparation or other necessary time. The fee allowed was apparently based upon 3 days of jury trial.

The statute specifically provides that the fees for services performed in criminal cases shall be "reasonable fees." § 29-1803.03, R. S. Supp., 1969. A reasonable attorney's fee ordinarily rests in the sound discretion of the court. Many elements enter into the determination of the amount of such a fee. The time element in such cases is not ordinarily measured by the time actually spent, but by the time reasonably and necessarily required in the performance of the duties. See, Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607; Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698. It may be entirely proper to have a guideline standard daily schedule of fees for trial time. Nevertheless, it is not proper to allow an attorney's fee in criminal cases only for time spent in trial, and refuse to make any allowance for time or services reasonably and necessarily required and performed prior to trial.

The bare bones of the present record establish only that the attorney's fee was insufficient because of the refusal to allow any amount for services prior to trial. It does not furnish adequate evidence upon which to

redetermine a reasonable attorney's fee. The judgment of the district court fixing the attorney's fee for the original trial is vacated. Upon remand, the district court is directed to redetermine the amount of a reasonable attorney's fee herein in accordance with this opinion and make such allowance.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

DENNIS ADLER, APPELLANT, V. JERRYCO MOTORS, INC., A CORPORATION, APPELLEE.
193 N. W. 2d 757

Filed January 28, 1972. No. 38126.

1. **Workmen's Compensation: Evidence: Appeal and Error.** In a workmen's compensation proceeding a district court finding against a party will be set aside if the evidence compels a finding for that party.
2. **Workmen's Compensation: Employer and Employee.** Under the Workmen's Compensation Act recreational or social activities are within the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded with directions.

Healey, Healey, Brown & Burchard, for appellant.

Chambers, Holland, Dudgeon & Beam, Cline, Williams, Wright, Johnson & Oldfather, and Kevin Colleran, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The Workmen's Compensation Court on original hear-

ing dismissed the claim of Dennis Adler against Jerryco Motors, Inc. After waiver of rehearing and on appeal to district court the claim again was dismissed. Adler appeals. The chief questions relate to our standard of review and to the connection between recreational or social activities and course of employment.

Adler suffered injuries in an accident on July 26, 1969, at Midwest Speedway in Lincoln while he was racing a Bultaco motorcycle owned by Jerryco. Jerome Biskup owned Jerryco which repaired and sold motorcycles at its place of business in Lincoln. He also was a member of a partnership that owned Midwest Speedway which held automobile and motorcycle races.

In 1967 Jerryco had desired to decrease its expenditures on racing programs. Adler with factory assistance had been racing a Triumph 650 motorcycle, winning almost every time. Jerryco engaged him February 1, 1967, at a monthly salary to manage its shop and racing program. Adler continued to race the Triumph with factory assistance and motorcycles owned by Jerryco. The Triumph decreased Jerryco's racing expenditures $1,000. The sums spent on the program were $4,000 in 1967, $2,000 in 1968, and less than $1,000 in 1969.

Midwest required no entry fee from Adler or others who concededly raced for Jerryco. Contrary to trade practice in an employee-employer relationship Biskup permitted Adler to keep prize money.

Jerryco advertising directly or indirectly referred to Adler. A Jerryco truck that hauled racing motorcycles to Midwest and nearby tracks displayed a caricature of Adler with his national racing number "47." "Jerryco" was the size of a signboard. The truck, as well as the Triumph and Adler's leathers, which Jerryco had not purchased, were orange and white, racing colors of Jerryco.

Jerryco once rented a booth at an automobile show in Pershing Auditorium at Lincoln. The Triumph stood on a pedestal 4 feet high, and a sign stated its high percentage of victories. Other indirect advertising oc-

curred on radio which described Jerryco to be, in Adler's words, " 'the place where the fast guys are the guys that win.' "

Biskup testified as follows: He had closely controlled the racing activity of Adler on Jerryco motorcycles. Adler was under a duty during employment hours not to prepare one for racing by him without specific permission. A similar requirement circumscribed the authority of Adler to drive the truck or to race a Jerryco motorcycle. He almost always requested permission which Biskup almost always granted. On July 26, 1969, Adler failed to do so, and Biskup knew nothing of plans for the race in which the injury occurred. Biskup would have denied permission, for Jerryco had cleaned the Bultaco to sell. The degree of control exercised by each man over motorcyclists who concededly raced for Jerryco is not detailed.

Adler denied close control. He had talked to Biskup on July 26, 1969, about the race prior to its start, both understanding he would enter. There were two Bultaco motorcycles, and the one for sale remained in the shop. Biskup did not subsequently contradict the testimony, and he produced no records to refute it.

The racing program indirectly advertised Jerryco motorcycles for sale. It also kept employees happy. Adler candidly admitted that his employment by Jerryco in no way depended upon his racing any motorcycle.

The district court may set aside a judgment of the Workmen's Compensation Court on rehearing only upon grounds of (1) no jurisdiction, (2) fraud, (3) insufficiency of the record to support the findings, and (4) inadequacy of findings to support the order. See § 48-184, R. R. S. 1943. This court on appeal may set aside the judgment of the district court only upon those grounds except subdivision (3) which reads: ". . . the findings of fact are not supported by the evidence as disclosed by the record, and, if so found, the cause shall be considered de novo upon the record." § 48-185, R. R. S. 1943.

The Legislature has prescribed two procedures for

processing workmen's compensation claims, carrying over rules that governed the compensation commissioner, whom the court superseded. See, §§ 48-177 to 48-185, R. R. S. 1943; Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352 (1939).

In Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971), after waiver of rehearing a judgment for a compensation claimant was affirmed. We said that we will consider the cause de novo only where the findings of fact are not supported by the evidence as disclosed by the record.

Sections 48-184 and 48-185, R. R. S. 1943, are silent about findings that may require no evidentiary support. We construe the sections to remedy the omission. In a workmen's compensation proceeding a district court finding against a party will be set aside if the evidence compels a finding for that party. When we set aside a material finding because of the evidence we will consider the cause de novo.

Recreational or social activities are within the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. 1 Larson, Workmen's Compensation, § 22.00, p. 349 (1968). See, also, § 48-151(6), R. R. S. 1943.

The district court found that the accident had not arisen out of or in the course of Adler's employment by Jerryco. The finding faces this evidence: Testimony to close control of Adler racing Jerryco motorcycles is weakened by admissions that Biskup almost always granted permission. It also clashes with normal duties of manager of the shop and racing program. Testimony of Biskup to his lack of knowledge and desires concerning the race on July 26, 1969, is not material in view of other evidence. The direct benefit to Jerryco from Adler racing Jerryco motorcycles at Midwest was substantial

enough to bring the activity within the course of employment under the above rule.

The evidence compels a finding that the injuries to Adler arose out of and in the course of his employment by Jerryco. The judgment is reversed and the cause remanded with directions to proceed in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROGER SIMONS, APPELLANT.
193 N. W. 2d 756

Filed January 28, 1972. No. 38153.

1. **Criminal Law: Larceny: Evidence: Trial.** In a prosecution for larceny in Nebraska a lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence.
2. **Criminal Law: Witnesses: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Gerald Buechler and Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

A jury found the defendant, Roger Simons, guilty of grand larceny. On appeal, the defendant asserts that the evidence is insufficient to support the judgment, and that there was no evidence of a lack of consent to the taking.

On the evening of April 5, 1971, the complaining witness, Cathy Bockman, accompanied a friend of hers, Sharon Michalski and one Dianna Lechleitner to an apartment occupied by the defendant, Roger Simons. The defendant and a man identified as Dick Price were in the apartment. When the complaining witness entered the defendant's apartment, she placed her purse which contained $150 in currency on the stove. Both of the other women knew the money was in the purse. At approximately 9:30 p.m., Cathy and Sharon left the apartment to pick up Cathy's husband but the purse was left on the stove. When they returned some time later, the three people were gone and the purse was gone. They found the purse across the hall in Sharon's apartment but the $150 was gone. Cathy Bockman, the complaining witness, then called the police. Charges were filed against the defendant Roger Simons and Dianna Lechleitner. A warrant was also issued for Dick Price but he was not found.

At the defendant's trial, Dianna Lechleitner testified that she saw the defendant and Dick Price take the money and they gave her $40 to "keep her mouth shut." She later turned the $40 over to the police and made a statement. The defendant's testimony was that Dianna Lechleitner and Dick Price had taken the money and that Price had given him $20 of it to apply on the rent.

The defendant's position apparently is that the testimony of an accomplice is insufficient as a matter of law to support a guilty verdict, and that there was no express testimony that the complaining witness did not consent to the taking.

The testimony of an accomplice is clearly sufficient where, together with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. See Leistritz v. State, 165 Neb. 220, 85 N. W. 2d 318.

In a prosecution for larceny in Nebraska a lack of

consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Nelson, 182 Neb. 31, 152 N. W. 2d 10.

In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence. State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181. While the evidence here was in conflict, it was clearly sufficient to go to the jury.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER LEGEAR, APPELLANT.
193 N. W. 2d 763

Filed January 28, 1972. No. 38176.

1. **Criminal Law: Guilty Plea: Trial.** The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty.
2. ———: ———: ———. The record of the arraignment at which a plea of guilty is entered must show that the court determined there was a factual basis for the plea.
3. **Criminal Law: Guilty Plea: Trial: Attorneys at Law.** The trial court may not rely upon generalized admissions or statements by defense counsel as a method for determining that there is a factual basis for a plea of guilty.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for unlawful sale of cannabis upon a plea of guilty. At the arraignment on October 5, 1970, the defendant pleaded not guilty. On March 25, 1971, the defendant appeared with private counsel and obtained leave to withdraw the plea of not guilty and enter a plea of guilty.

At this hearing the district judge advised the defendant as to his rights and addressed him personally to determine that the plea was voluntary and was entered intelligently and understandingly. Inquiry was made as to plea bargaining, and the county attorney advised the court that a separate charge for sale of LSD was to be dismissed in exchange for the plea of guilty in this case. The defendant acknowledged that this was his understanding of the plea bargain; that there had been no promise of leniency; and that the court was not a party to the plea bargaining and was not bound by it.

On May 17, 1971, when the defendant appeared for sentencing, the defendant's counsel moved for leave to withdraw the plea of guilty and for leave to withdraw as counsel for the defendant. Both motions were overruled and the defendant was sentenced to imprisonment for 3 to 5 years. The defendant is now represented by other counsel.

There was no evidence offered in support of either motion at the hearing on May 17, 1971. The showing made consisted of statements by the defendant and his counsel to the court at the hearing.

The defendant's counsel stated there had been an arrangement with the county attorney's office and the police that if the defendant could make a purchase of heroin, or assist in the identification of a person selling heroin, a recommendation for probation would be made; and that the defendant had made two attempts to carry out the arrangement but was unsuccessful. The defendant's counsel further stated the defendant had said that he was not satisfied with the course of the pro-

ceedings; that he thought he was not guilty; that he thought the State could not prove its case; and that he wanted another lawyer. The defendant's counsel further stated that he did not agree with the defendant's present position in the case.

The defendant stated that he did not feel guilty; that he would like to stand trial; that he was under the impression there would be a recommendation of probation; and that he did not understand a recommendation by the county attorney was not binding on the court.

The defendant contends that the motion to withdraw the plea of guilty should have been sustained because there had been a breach of a plea bargain and the record does not show that the trial court ascertained there was a factual basis for the plea.

The record fails to show any breach of a plea bargain. The bargain which was disclosed at the hearing on March 25, 1971, was fully performed. The arrangement for a recommendation of probation, not disclosed until the hearing on May 17, 1971, was conditioned upon the defendant making a purchase of heroin, or identifying a seller. The defendant did not perform his part of the arrangement so there was no basis for a withdrawal of the plea on this ground.

At the hearing on March 25, 1971, the trial court made no inquiry of the defendant to determine that there was a factual basis for the plea of guilty. The Standards Relating to Pleas of Guilty, promulgated by the American Bar Association, require that the court satisfy itself there is a factual basis for the plea. The standards further require that the record of the proceedings include the inquiry into the accuracy of the plea. See Standards Relating to Pleas of Guilty, Approved Draft, 1968, § 1.6, p. 30, and § 1.7, p. 34. In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, decided February 11, 1971, we said the Standards Relating to Pleas of Guilty should be the minimum procedure for the taking of guilty pleas in this state.

Although the trial court is not required to determine that there is a factual basis for a plea of guilty by inquiring of the defendant, that may be the most satisfactory method in many cases. See McCarthy v. United States, 394 U. S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418. Inquiry of the county attorney or examination of the presentence report have been suggested as alternative methods in a proper case.

The record in this case suggests that the trial court relied upon defense counsel in determining that there was a factual basis for the plea. At the hearing on May 17, 1971, the trial court questioned the defendant's counsel as to whether he thought and believed the defendant was guilty at the time of the hearing on March 25, 1971. Although the defendant's counsel did not respond directly, his remarks implied that he had believed the defendant was guilty.

Reliance upon defense counsel as a method to determine the accuracy of the plea has been disapproved. See, United States v. Cody, 438 F. 2d 287 (8th Cir.); United States v. Tucker, 425 F. 2d 624 (4th Cir.). In the Tucker case the court said: "Nor do generalized admissions or statements by a defendant's counsel meet the requirement that the court be satisfied that there is a factual basis for the plea from the defendant's own admission that he engaged in conduct which constitutes the charged offense."

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

I respectfully dissent from the majority opinion in this case.

It has long been the rule that an information must be sufficiently definite to apprise the accused of the specific nature of the offense with which he is charged. The defendant had the information served upon him and the statute read to him. He was thereby apprised

of the exact act with which he was charged and of the provision of the statute he was alleged to have violated. In addition, he had retained counsel of his own choosing and was undoubtedly fully advised of all the pertinent circumstances and law. Defendant, under these conditions, elected to enter a plea of guilty and entered into a plea bargain with the county attorney whereby the county attorney agreed to and did dismiss another pending charge. Experience with this type of case has demonstrated that after the county attorney has fulfilled his part of the bargain by dismissing additional charges, the defendants all too often feel that they are then in a position to renege on a plea of guilty. Such was obviously the case here. A defendant who voluntarily enters a plea of guilty under circumstances similar to the present one does so knowingly and voluntarily. He is fully aware of the exact acts charged as comprising the crime alleged and his plea of guilty is a direct admission that he did actually perform those acts. For the court to be required to inquire further into the facts pertaining to the offense would be to require a superfluous act and verges on the ridiculous.

WHITE, C. J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. LEON E. FELLMAN, APPELLANT.
193 N. W. 2d 775

Filed January 28, 1972. No. 37955.

1. **Criminal Law: Evidence: Trial.** Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only where the jury could properly find guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Trial: Witnesses: Courts.** The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the trial court.
3. ———: ———: ———: ———: ———. In a criminal prosecution where a State witness testified to hearsay on cross-

examination, discretion over objection to permit hearsay on redirect examination is limited.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

John J. Powers, for appellant.

Clarence A. H. Meyer, Attorney General, and E. D. Warnsholz, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A dentist, Leon E. Fellman, participated in the Medicaid Program for welfare patients. In that connection an information charged him with obtaining money from the State by false pretenses. A jury found him not guilty on Count I and guilty on three counts. Fellman appeals. He asserts insufficient evidence to prove criminal intent and error in admission of evidence concerning his other Medicaid transactions.

The program theoretically followed these general lines. An indigent desiring dental treatment informed a county caseworker who referred him to his dentist. After examination the dentist filled out a report form stating his recommendations and checking a fee schedule. The county forwarded a report with estimated fees of $250 or more to the State for authorization. After receiving authority, the county forwarded the certified report together with a claim form to the dentist. On the claim form the dentist stated completion of services on a designated date and the amount of his claim. It was paid by a State warrant.

The Douglas County welfare division, suspecting irregularities, requested assistance of the local dental society early in 1969. The society's president appointed a committee of three dentists to work with Hubert J. Wegener, D.D.S., and chief of the local dental health department. After some investigation the committee

was replaced by the society's ethics committee which was composed of other dentists.

Approximately 165 dentists were participating in the program. Committee examinations represented a random sample of possibly irregular cases of 100 dentists. Wegener in reviewing the examinations did not find excessive discrepancies overall.

Wegener or Frederick A. Breeze, D.D.S., and chairman of the ethics committee, examined the four patients named in the counts that went to the jury: Roosevelt Collier, Count I; and Marie Mendenhall, Deanna Wiksell Glessman, and Janet Bandy, Counts II, III, and IV.

The State in 1967 and early 1968 paid Fellman's claims for services rendered Marie, Deanna, and Janet. Fellman in fact had not rendered some of the services. Discrepancies still existed in 1969 when the investigation began.

Irene Richter testified as follows. Dental secretary of Fellman since 1959, she had been handling all paper work, filling out forms, and transcribing his notes for reports. When she laid forms on his desk for signature, she knew that some claims included unperformed services. The State limited performance time to 90 days, and obtaining extensions would increase her paper work. She believed that Fellman would complete the work.

Janet refused to return to Fellman because she had no confidence in him. Deanna consulted another dentist because her girl friend was his patient. Collier failed to return for a partial denture that Fellman had ordered, received, and paid for in due course.

Marie testified to a conversation with Fellman on her last visit: "He told me . . . that he was in a lot of trouble over this and would I tell them anything to get them off of his back. . . . He had told me to tell, couldn't I tell them that the teeth were there in May and I just didn't pick them up."

Fellman, age 62, testified as follows. The foregoing testimony of Marie was false. His practice had been

heavy, and the number of welfare patients had exceeded his original estimate. He relied on Irene: "Q. You have heard . . . (Irene) testify . . . to her putting forms on your desk for your signature . . .? A. Yes. Q. Was that the custom at the time? A. Yes. Q. You did sign this claim form for the dentures (for Marie) when actually the work had not been done . . .? A. Yes, sir. Q. Did you realize it at the time . . .? A. I don't know whether I did or didn't . . .. I should have realized it . . .." At no time did he intend to cheat or defraud the State.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). Criminal intent of Fellman was an issue for the jury.

The evidentiary questions arose during the testimony of Breeze, a witness for the prosecution, as follows. Each member of the ethics committee examined only part of the cases. On recross-examination counsel elicited this repetitive answer: The ethics committee, conducting no general investigation, had only investigated Fellman and two other dentists.

On subsequent redirect examination Breeze testified: "Q. . . . how many patients of Dr. Fellman did your committee or you examine? . . . (Objections) BY THE COURT: Overruled. You opened it up. A. 56. Q. 56? A. Yes. Q. Of those patients . . . did you arrive at a percentage of discrepancies between the amount of work billed for and the amount of work the dentist did? . . . (Objections) BY THE COURT: . . . We are talking about Dr. Fellman. Limit your question to Dr. Fellman. Q. Did you arrive during the general investigation of Dr. Fellman specifically as to a percentage of discrepancy between the . . . work billed . . . and the . . . work done, from your sample? . . . (Objections overruled) A. The frequency with which we found irregularities that we could not explain away in any fashion was 72 per cent

of the cases we examined. . . . In Dr. Fellman's cases specifically . . .." At the conclusion of Breeze' testimony defense counsel unsuccessfully moved for a mistrial.

The court instructed the jury: "To determine the intent of the defendant in this case, you are to examine all the evidence, facts, and circumstances appearing in the case which may throw any light upon the alleged intent of the defendant."

Prior use of similar inadmissible evidence may be governed by theories of estoppel or waiver of objection in advance. See 1 Wigmore on Evidence, §§ 15 and 18, pp. 304 and 321 (3d Ed., 1940).

The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the court. See State v. McClelland, 72 N. D. 665, 10 N. W. 2d 798 (1943). In a criminal prosecution where a State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination is limited. See Karnes v. State, 111 Neb. 435, 196 N. W. 676 (1923) (by implication).

The recross-examination of Breeze opened nothing, but there is a broader ground for decision. The testimony was repetitive, unambiguous, and harmless. It had no tendency to discredit Breeze before the jury or to exonerate Fellman. The prosecution on redirect examination over objections nevertheless stigmatized Fellman with testimony that reeked of incompetency. The rulings on Fellman's objections represented an abuse of discretion.

On Counts II, III, and IV the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

The majority opinion holds that evidence showing discrepancies in 72 percent of the cases handled by de-

fendant under the Medicaid Program was erroneously admitted.

Defendant was charged with obtaining money by false pretenses, i.e., by submitting false claims for remuneration. The charge is one requiring proof of an "intent to cheat and defraud." The questions eliciting the evidence were objected to as calling for incompetent, immaterial, irrelevant testimony, and for insufficient foundation.

Irregularities in claims submitted for work done under the program were investigated by the Ethics Committee of the Omaha District Dental Society of which the witness was chairman. There were six members of the committee participating in the investigation. Three worked on Wednesday and three on Thursday. Patients were examined and dental work found compared with defendant's reports of work done. Statements were signed as to irregularities present or absent in each case. The witness did not personally check each patient or report. On completion of the review, defendant was present for a session with the committee and another review of his patients. It appears defendant was kept fully apprised of the work of the committee and of its findings. He knew or could readily ascertain the nature of the claims he had signed and submitted. He could ascertain from his own records the work done. Under such circumstances, findings of the committee regarding irregularities and the extent of them could not have taken him by surprise.

The defendant claimed that the irregularities with which he was charged, six in number, resulted from mistake and that he had no intent to cheat or defraud. Under the circumstances, evidence of other similar offenses was certainly relevant and material on the question of intent. See, State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87; State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203. Was it hearsay and consequently incompetent as held in the majority opinion? The hearsay rule has many

exceptions and the present trend appears to be to narrow the operation of the rule. One evidence of this is the Uniform Composite Reports As Evidence Act. See, §§ 25-12,115 to 25-12,119, R. R. S. 1943. The act provides that any written report *or finding of facts* prepared by a distinterested expert containing conclusions resulting wholly *or partly* from written information furnished by the cooperation of several persons acting for a common purpose shall be admissible when testified to by one of the persons making such report or finding, if, in the opinion of the court, no substantial injustice will be done the opposite party. Here the evidence is based on reports made by members of a disinterested committee acting for a common purpose. The result was testified to by one of the committee members, its chairman, who, in such capacity, was necessarily in charge of the work done.

The act provides broadly for cross-examination of all persons involved in the making of the report or finding. It further provides that notice must be given before trial of the intention to use such report or finding. No such notice was given in the present case, but this requirement is qualified by the following language: "* * * except that it may be admitted if the trial court finds that no substantial injustice would result from the failure to give such notice."

The evidence is obviously reliable which nullifies, in this case, the principal evil inherent in hearsay evidence. The right of a full cross-examination is preserved by the act. The defendant was fully aware of the nature of the reports and findings by virtue of records available to him and of having reviewed them with the committee. Under such circumstances, no substantial injustice could result to the defendant by the waiver of notice and the admission of this evidence other than that it was simply additional evidence of guilt. Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672, in referring to the act stated: "The act referred to gives the trial judge discretion to admit

such evidence if the trial court finds that no injustice would result from the failure to give such notice."

Although no cautionary instruction limiting this evidence to the question of intent was given, none was requested and assignments of error do not refer to this proposition. In any event, such instruction is not required in the absence of a request for it. See, Osborne v. State, 115 Neb. 65, 211 N. W. 179; 23A C. J. S., Criminal Law, § 1325 (5), p. 843.

The questioned evidence was properly admitted and I would affirm the judgment of the trial court.

WHITE, C. J., and CLINTON, J., join in this dissent.

SHIRLEY ANN GOREE, APPELLEE, V. MERLE RAY GOREE, APPELLANT.
194 N. W. 2d 212

Filed February 4, 1972. No. 38017.

1. **Annulment of Marriage: Fraud: Infants.** If a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified with knowledge thereof.
2. **Divorce: Evidence: Pleadings.** No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed in part and in part reversed.

Joseph H. Dea and Homer E. Hurt, Jr., for appellant.

Kerrigan, Line & Martin, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

In this proceeding, Shirley Ann Goree was granted a decree of divorce and the sum of $20 per week child support. The cross-petition of the defendant, Merle Ray Goree, praying for an annulment of the marriage was dismissed. He has appealed, asserting that the granting of the divorce and the failure to grant the annulment were both erroneous.

Plaintiff and defendant had gone together since the plaintiff was a freshman in high school. They had had repeated sexual relations prior to 1969. The defendant entered military service on August 3, 1967. He served overseas in Thailand from December 7, 1968, until December 2, 1969, except for a 30-day leave from May 15, 1969, until June 15, 1969, during which time he returned to Nebraska. Plaintiff and defendant had sexual relations during his leave. After June 15, 1969, he was in Thailand until December 2, 1969, when he returned to the United States assigned to duty at Offutt Field, Omaha, Nebraska. He arrived in Nebraska on December 4, 1969. On that date, plaintiff and defendant resumed sexual relations.

The evidence indicates that in January of 1970, the plaintiff told the defendant she thought she was pregnant and that he was the father. They also discussed the possibility of marriage. On April 8, 1970, the plaintiff wrote to defendant telling him that he was going to be a father. Thereafter the plaintiff and defendant made arrangements for marriage and were married on June 19, 1970, at Wisner, Nebraska. After the marriage, the defendant returned to his station at Offutt Field and the plaintiff returned to the dormitory of the school she was attending in Fremont, Nebraska. The child was born on July 12, 1970.

The defendant's direct testimony was that he believed the plaintiff's statement that he was the father, but when the child was born on July 12, 1970, he was convinced that the baby was born too early for him to be the

father. The doctor who delivered the child stated his opinion that the baby was a full term baby. His first examination was on June 29, 1970, and at that time he estimated delivery in the latter part of July. In response to a question as to whether the baby could have been conceived on December 4, 1969, he said that he "would doubt it." He stated the foundation for his doubt to be that conception on that date would have made the delivery approximately 5 weeks early and he saw no signs of prematurity, although he did not care for the baby after it was born.

There was evidence that prior to December 4, 1969, the plaintiff had stated that she thought she was carrying the child of another man. There is testimony which would indicate that the defendant knew of the plaintiff's relationship with that man as early as May 1970. There is also testimony which would indicate that the defendant doubted he was the father as early as January 1970, and, in any event before the marriage. At or shortly after the birth at the latest, the defendant knew that plaintiff had had sexual relations with the other individual. One more critical factual issue must be mentioned. The plaintiff testified and the defendant admitted on cross-examination that he had intercourse with the plaintiff on two different occasions after the birth of the child.

In the posture of this case, the issues involved in the defendant's cross-petition for annulment will be discussed first. Both parties rely upon the case of Zutavern v. Zutavern, 155 Neb. 395, 52 N. W. 2d 254. That case held that "if a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified with knowledge thereof." Here there is an issue as to the truth or falsity of the

statement relied upon. There is also conflicting evidence as to whether the defendant believed or relied upon the statement in any event. The trial court, who saw and heard the witnesses, resolved those issues against the defendant. Even assuming that plaintiff's statement was false and fraudulent and that the defendant married her in reliance on the statement, under the circumstances of this record his continued sexual relations with her after the birth of the child would constitute ratification of the marriage. See Zutavern v. Zutavern, *supra*. The court's action in dismissing defendant's cross-petition for an annulment was entirely correct.

Plaintiff in her petition for divorce charged the defendant with extreme cruelty. The plaintiff testified that defendant threatened her if she would not go along with him in giving him an annulment instead of a divorce because he wanted to marry a Catholic girl. She also testified that he repeatedly stated that he was not the father of the child. The defendant admitted and confirmed this statement in his pleadings and on the witness stand. Two witnesses testified that sometime in July, August, or September of 1970, on one occasion the witnesses heard plaintiff and defendant shouting or arguing in angry voices but could not hear what was said. This was the sole and only corroboration of any kind to establish the basic allegation of extreme cruelty.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." That statute, word for word, has remained unchanged since 1866. The purpose of the statute was to prevent obtaining divorces by collusion or fraud. See Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926. It may well be that the statute has generated more collusion and fraud than it may have prevented.

In several jurisdictions there are statutes which expressly or impliedly require corroboration. However, at common law and in the great majority of the jurisdictions, it is held that in the absence of a statute to the contrary, there is no hard and fast rule requiring that there be corroboration of plaintiff's testimony concerning the ground for divorce. See Annotation, Necessity and Sufficiency of Corroboration of Plaintiff's Testimony Concerning Ground for Divorce, 15 A. L. R. 2d 170.

The variance in judicial rules adopted by the courts in the absence of statute suggests the wide variety of possible statutory or judicial solutions. The corroborative evidence statute involves issues which are clearly policy matters for legislative determination. The fact that the present statute has been in effect for over 100 years might well suggest a reexamination by the Legislature. Legislative divorce policy of an era before Nebraska became a state may or may not reflect her modern mood.

The trial court here reached a practical and reasonable solution. We are reluctant to upset that determination and to blot out a logical view of practical reality, but the statute leaves us no alternative. That portion of the judgment dismissing defendant's cross-petition is affirmed. The judgment granting plaintiff an absolute divorce is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

JOHN H. RUDDER, APPELLEE, V. AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, A FOREIGN CORPORATION, APPELLANT.
194 N. W. 2d 175

Filed February 4, 1972. No. 38019.

1. **Insurance: Contracts: Statutes.** Where an applicable statutory provision conflicts with the provisions of the insurance policy, the statute and not the insurance policy controls.

2. ———: ———: ———. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
3. ———: ———: ———. Rules of interpretation are resorted to for purpose of resolving an ambiguity in the statute, and not of creating it.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Merritt E. James, for appellant.

A. James McArthur, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

Plaintiff brings this action for a declaration of his rights and defendant's responsibilities under a policy of motor vehicle liability insurance issued to the plaintiff by the defendant, and certified under the Motor Vehicle Safety Responsibility Act, Chapter 60, article 5, R. R. S. 1943. This controversy was initiated when the defendant denied coverage for an accident, relying on an exclusionary clause of the policy. The district court rendered judgment on the pleadings in favor of the plaintiff, ruling that the exclusionary clause was without legal effect. We affirm the judgment of the district court.

The pleadings show that the policy, certified under the Motor Vehicle Safety Responsibility Act, was issued to the plaintiff on December 9, 1969. On January 11, 1970, plaintiff was involved in an accident for which claims for damages were made against him. At the time of this accident, plaintiff was driving a vehicle owned by his brother, members of the same household. The defendant denied coverage for the accident, relying on Section V c 1 of the policy, which provides: "This insuring agreement does not apply: 1. to any automobile owned by or hired, furnished or available for the

regular use of such named insured, spouse or any resident of the same household."

The exclusionary clause of the policy is in conflict with section 60-535, R. R. S. 1943, which provides: "Such motor vehicle liability policy shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him * * *." Where such an applicable statutory provision conflicts with the provisions of the insurance policy, the statute and not the insurance policy controls. Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179; State Farm Mut. Auto. Ins. Co. v. Pierce, 182 Neb. 805, 157 N. W. 2d 399.

The defendant seeks to avoid this result on the theory that section 60-535, R. R. S. 1943, was not intended to apply to an owner's, as opposed to an operator's, motor vehicle liability policy. Our attention is called to certain legislative history which is purported to signify that such a distinction was intended. We deem it necessary only to observe that in 1965 the Nebraska Legislature amended section 60-535, R. R. S. 1943, by substituting the opening and closing phrases, "such motor vehicle liability policy," for the prior phrases, "such operator's policy of liability insurance." It would thus appear that any distinction which may have existed between owners' and operators' policies was eliminated by the 1965 amendment.

The statute involved, section 60-535, R. R. S. 1943, is clear and unambiguous. It was designed to implement and effectuate the strong public policy considerations present in the Motor Vehicle Safety Responsibility Act, Chapter 60, article 5, R. R. S. 1943. By its terms and on its face, the statute clearly requires no interpretation. It obviously is directed toward the public protective purposes of the Motor Vehicle Safety Responsibility Act. Its mandatory requirement as to the breadth of the coverage implements this purpose. No rule of law is more

firmly established than the one that where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. Contrary to the position of the defendant, a statute is not available for a construction as a matter of course, and if it is unambiguous, there is no room for construction. The court may not search for a meaning beyond the statute itself. Rules of interpretation are resorted to for purpose of resolving an ambiguity in the statute, and not of creating it. The rules of statutory construction, sought to be resorted to by the defendant, are not applicable. Bessey v. Board of Educational Lands & Funds, 185 Neb. 801, 178 N. W. 2d 794; Peck v. Dunlevey, 184 Neb. 812, 172 N. W. 2d 613; State v. Sabin, 184 Neb. 784, 172 N. W. 2d 89.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

EDMUND HOLLSTEIN ET AL., APPELLEES, V. KENNETH D. ADAMS ET AL., APPELLANTS, IMPLEADED WITH UNITED STATES OF AMERICA ET AL., APPELLEES.

194 N. W. 2d 216

Filed February 4, 1972. No. 38030.

1. **Judicial Sales: Notice: Words and Phrases.** A judicial sale advertised for the front door of the courthouse may be held at the front of the steps on the first floor inside the courthouse.
2. **Judicial Sales: Notice: Words and Phrases: Time.** If a publication day falls upon a holiday, publication the preceding day in a weekly newspaper complies with the statutory requirement that publication be had upon the same day of the week as the first publication.
3. **Judicial Sales: Notice: Mortgages: Foreclosure.** A mortgagor in a foreclosure proceeding is not entitled to personal service of the published notice of sale.
4. **Judicial Sales: Courts.** Confirmation of a judicial sale is within the discretion of the trial court.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Charles A. Fisher and Charles F. Fisher, for appellants.

Edmund Hollstein, for appellees Hollstein.

Richard A. Dier, John A. Gale, Wade H. Ellis, Laurice M. Margheim, and Bump & Bump, for appellees United States of America et al.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The district court in this proceeding to foreclose a real estate mortgage confirmed the sale of the mortgaged property. The mortgagors, Kenneth D. and Anna R. Adams, appeal. They assert (1) noncomformity between the place of the sale and the place advertised, (2) irregular publication of the notice of sale, (3) absence of service of the notice upon them, and (4) inadequacy of the sale price.

The notice of sale was published in a weekly newspaper on November 25, December 3, 10, 17, and 24, 1970. The Thanksgiving holiday that year fell on November 26, the regular day of publication. The notice advertised the place of sale to be the front door of the county courthouse. No copy was served upon the Adamses, who were husband and wife.

Kenneth attended the sale. Cold weather caused the sheriff at the specified time to move the place of sale to the front of the steps on the first floor inside the courthouse. He received two bids, James Prokop submitting the higher bid. At the confirmation hearing the evidence of value was conflicting. No one submitted an upset bid.

A judicial sale advertised for the front door of the courthouse may be held at the front of the steps on the first floor inside the courthouse. See § 25-1536, R. R.

S. 1943; cf. Seymour v. Lawson, 111 Neb. 770, 197 N. W. 623 (1926).

If legal notice is required to be published more than 1 week, publication "shall be upon the same day of the week as the first publication." § 25-2228, R. R. S. 1943. The provision is not mandatory. If a publication day falls upon a holiday, publication the preceding day complies with the statute. Section 25-1529, R. R. S. 1943, requires notification in order to inform the public of the nature of the property, place, date, and terms of the sale. See Farmers Security Bank v. Wood, 132 Neb. 175, 271 N. W. 349 (1937). It is satisfied by substantial compliance. The complaint of the Adamses in this respect is not well taken.

A mortgagor is not entitled to personal service of the published notice of sale. See § 25-520.01, R. R. S. 1943. The statutory provision applied to the Adamses.

Confirmation of a judicial sale is within the discretion of the trial court. Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417 (1969). In the present proceeding the trial court acted well within its discretion.

The order of confirmation is affirmed.

AFFIRMED.

BERNARD F. BISHOFF, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. HERMAN PIEPER, AS MAYOR AND A MEMBER OF THE CITY COUNCIL OF HARVARD, NEBRASKA, AND AS AN INDIVIDUAL, ET AL., APPELLEES.
194 N. W. 2d 177

Filed February 4, 1972. No. 38047.

Pleadings: Evidence. Where a party affirmatively pleads the existence of a fact material to the issue, he assumes the burden of proving such fact.

Appeal from the district court for Clay County: NORRIS CHADDERDON, Judge. Affirmed.

Robert E. Paulick, for appellant.

John A. Bottorf and David J. Maser, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action instituted by a resident taxpayer of the city of Harvard, Nebraska, against the city, the mayor, members of the city council, and the trustees of the William A. Farmer estate. Its purpose is to recover for the city and the trust the funds expended in paving a street or road on the eastern boundary of Harvard. Judgment was entered for defendants. We affirm the judgment of the district court.

This record fails to reveal whether the road in question is within, partly within, or without the city limits. No city funds were expended on the road so the action must fail as to the city and its officers.

It is alleged that the will of William A. Farmer bequeathed funds in trust for the purpose of assisting in the paving of streets within the city of Harvard. There is no competent evidence disclosing the nature of the trust; nor, as pointed out, is there any evidence that the street or road paved lies outside the city limits. No breach of trust appearing, the action must also fail as to the trustees.

Where a party affirmatively pleads the existence of a fact material to the issue, he assumes the burden of proving such fact. See Sack v. Sack, 156 Neb. 171, 55 N. W. 2d 505.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE THOMAS BEVINS, APPELLANT.

194 N. W. 2d 181

Filed February 4, 1972. No. 38096.

1. **Criminal Law: Intoxication: Intent.** Ordinarily voluntary intoxication is no justification or excuse for crime, but excessive intoxication by which a person is wholly deprived of reason may prevent one from having the intent charged.
2. **Criminal Law: Guilty Plea: Trial: Attorneys at Law.** It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Thomas D. Carey, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a post conviction proceeding. Defendant was convicted several years ago of breaking and entering into a Hinky Dinky store in Omaha, Nebraska. He was represented by the assistant public defender and now claims he was inadequately and incompetently represented. The district court refused to vacate defendant's sentence. We affirm that judgment.

The record reflects that defendant and a brother were caught red-handed while attempting to enter a safe in the store and were apprehended in the building. Defendant states he was too drunk at the time to have the required intent to commit the offense and called this to his attorney's attention. He was informed that having been caught in the store, he did not have a chance and

would receive a lighter sentence if he pled guilty. This was also the advice of his brother and they did plead guilty. The attorney does not recall the case, but it was stipulated that he had a fine reputation as a defense attorney in criminal cases.

The brother states he had to get defendant very drunk by visiting several taverns before he would consent to assist in the burglary. The probation officer's report shows defendant informed him that defendant and his brother had been driving around when they decided to burglarize the store. It is at complete variance with the brother's evidence.

There is also evidence of a police officer that when he entered the store, defendant and his brother ran from the front to the back, then up and down behind a counter, and finally into a back room and thence to the basement. He saw no evidence of intoxication.

Defendant had been previously convicted of a rape-robbery and of auto theft. His brother has six felony convictions.

Ordinarily voluntary intoxication is no justification or excuse for crime, but excessive intoxication by which a person is wholly deprived of reason may prevent one from having the intent charged. See Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761. The record here fails to sustain the contention of intoxication. It is highly questionable that it was even mentioned to defendant's lawyer. Certainly, the stories now told by the defendant and his brother are at complete variance to the one told by defendant to the probation officer soon after their arrest. Defendant then indicated the decision to commit the offense was one in which he participated and there is no mention of tavern-hopping, drinking, or intoxication. Lack of intoxication is verified by the arresting officer.

When men are caught in the actual commission of a crime and have no defense whatever, any competent lawyer will advise a plea of guilty and thereby seek a

more lenient sentence. There is no valid evidence of incompetence.

Furthermore, a lawyer is not required to be infallible. In McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763, it is stated: "It is no denigration of the right to trial to hold that *when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.*" (Emphasis supplied.)

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BUREN K. FULTON, APPELLANT.
194 N. W. 2d 187

Filed February 4, 1972. No. 38130.

Criminal Law: Appeal and Error: Fines. Where a defendant in a criminal action has voluntarily paid a fine imposed upon him, he waives his right of appeal.

Appeal from the district court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

R. Stanley Ditus, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Defendant pleaded guilty in county court to a charge of operating a motor vehicle upon public highways while he was under the influence of alcoholic liquor. The county court on March 13, 1971, imposed a fine of $100 and costs taxed at $22.50. It also revoked his operator's license for 6 months. Defendant voluntarily paid the

fine and costs, and surrendered his operator's license. On March 16 he perfected a purported appeal to district court. The county judge then returned the license to defendant. The district court dismissed the appeal. Defendant appeals.

Where a defendant in a criminal action has voluntarily paid a fine imposed upon him, he waives his right of appeal. Abbott v. State, 160 Neb. 275, 69 N. W. 2d 878 (1955).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THURMAN LITTLE COOK, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JACK RONALD TIMM, APPELLANT.

194 N. W. 2d 218

Filed February 4, 1972. Nos. 38139, 38147.

1. **Criminal Law: Burglary: Evidence.** While mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged.
2. ———: ———: ———. In order for a defendant's possession of stolen property to be sufficient to support a conviction, such possession must be recent, that is, not too remote in time from the crime.
3. ———: ———: ———. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
4. **Criminal Law: Trial: Aider and Abettor.** Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

Appeals from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Frank B. Morrison, Stanley A. Krieger, and Bennett G. Hornstein, for appellants.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendants Thurman Little Cook and Jack Ronald Timm, along with Bobby Joe Young, were prosecuted and convicted for breaking and entering or entering without breaking an automobile. Cook and Timm were each sentenced to a term of 2 years imprisonment in the Nebraska Penal and Correctional Complex. They have perfected appeals to this court, predicated on the insufficiency of the evidence. We affirm.

Carl Edward Cull parked his automobile in a parking lot at Thirteenth and Douglas Streets in Omaha, Nebraska, at 12:30 p.m., February 1, 1971, and went to his place of employment. He told the attendant on duty that he was going to work until 8 p.m. The attendant told him that when he went off duty at 5:30 he would put the keys to the car either in the ashtray or above the visor. When Cull went for his car at 8:30 p.m., it was gone. He immediately started to walk back to his place of employment, and as he approached Fifteenth and Douglas Streets, three persons pulled up in his car and parked. Bobby Joe Young was driving the car. Defendant Cook was in the front passenger seat, and defendant Timm was in the back seat. The defendants got out of the car and started across Douglas Street to the north.

Cull stopped a police car which was cruising by and gave two officers the story. The police car then pulled up alongside the three men and the officers ordered them to stop. Defendant Cook kept on walking, and one of the officers went after him and brought him back to the

police car. As the police officers frisked the men, Cull's stereo tape deck, which had been in the glove compartment of his car, fell from under the jacket of one of the defendants. He thought it fell from defendant Cook's jacket, but one of the police officers testified that it fell from under defendant Timm's jacket. The keys to Cull's car were found on Bobby Joe Young. Both Cull and the police officer who testified stated that school papers and other articles were scattered throughout the car, indicating that it had been thoroughly ransacked.

Defendants' position seems to be posited on two points: A lapse of 8 hours between the parking of the car and the apprehension of the defendants; and an intimation that there is some question as to who had possession of the stolen property. In State v. Solano, 181 Neb. 716, 150 N. W. 2d 585, we held that while mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged.

Defendants imply that because 8 hours elapsed between the parking of the car and their apprehension, the possession of the stolen property is too remote within the Solano rule. The rule is that in order for a defendant's possession of stolen property to be sufficient to support a conviction, such possession must be recent, that is, not too remote in point of time from the crime. Giving defendants' argument its maximum reach, we interpret 8 hours as "recent" within the Solano rule. Actually, the jury could reasonably have inferred that the car was taken from the lot sometime after 5:30 p.m. when the attendant went off duty. The defendants were apprehended in possession of the stolen property at or near the scene of the crime, and the only logical inference from the evidence is that defendants' pos-

session of stolen property was continuous from the commission of the crime.

In their second point, defendants raise the question that there is a conflict in the evidence as to whether the tape recorder fell from under Cook's or Timm's jacket. Our answer is that it is immaterial in this case. There is sufficient evidence from which the jury might have inferred that defendants were present at the commission of the crime and participated in it. In Miller v. State, 173 Neb. 268, 113 N. W. 2d 118, we said: "A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto."

Section 28-201, R. R. S. 1943, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." The jury was fully instructed on aiding and abetting. In this case, the parties were caught in the immediate vicinity of the parking lot with the stolen property in possession of one of them, coupled with no explanation; with the additional facts that the car had been ransacked and that defendant Cook tried to take off across the street when they were ordered to stop and the officer had to go after him; and further that Young, who was one of the three parties, had the keys to the car in his possession.

We conclude that under the circumstances of this case, there were sufficient corroborating circumstances and evidence, beyond the mere naked possession of the recently-stolen property, to warrant the submission of the case to the jury and to sustain the verdicts of guilty in the case.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. REED, APPELLANT.
194 N. W. 2d 179

Filed February 4, 1972. No. 38173.

Criminal Law: Guilty Plea: Indictments and Informations. A plea of guilty induced by the filing of a habitual criminal charge 3 days before trial was not invalid where the defendant was represented by counsel and the circumstances show that the plea was voluntarily and understandingly entered.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for burglary upon a plea of guilty. He contends that the conviction should be reversed because his plea was coerced by the filing of a habitual criminal charge; the trial court failed to advise him of certain constitutional rights; and the trial court failed to ascertain that there was a factual basis for the plea.

At the arraignment on July 13, 1970, the defendant appeared with the public defender and pleaded not guilty. On January 22, 1971, 3 days before the case was set for trial, an amended information was filed which charged the defendant with being a habitual criminal. On January 25, 1971, the defendant appeared with private counsel, withdrew his plea of not guilty, and entered a plea of guilty to the burglary charge.

The plea was the result of a plea bargain. In return for the defendant's plea of guilty to the burglary charge,

the county attorney agreed to dismiss the habitual criminal charge, dismiss a separate burglary charge (referred to as Doc. 81, No. 435), and recommend a sentence of imprisonment for not to exceed 7 years. The terms of the plea bargain were disclosed in open court and the bargain was fully performed.

The defendant claims that his plea was involuntary because it was made to avoid the chance of a long sentence on the habitual criminal charge. This case is similar to North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, in which the defendant claimed that he was innocent but pleaded guilty to second degree murder in order to avoid the possibility of a death sentence. The United States Supreme Court held that such a plea was valid. See, also, Ford v. United States, 418 F. 2d 855 (8th Cir., 1969), 295 F. Supp. 1180; Meyer v. United States, 424 F. 2d 1181 (8th Cir., 1969); Hulett v. Sigler, 242 F. Supp. 705 (D. C. Neb., 1965).

Here the defendant was represented by counsel and the alternatives were discussed at length. The defendant's plea was the "product of a free and rational choice." North Carolina v. Alford, *supra*.

The fact that the habitual criminal charge was added by amendment just before the case was set for trial does not afford the defendant any basis for relief. It is within the discretion of the county attorney to decide whether such a charge should be filed, and the time of filing is of no consequence.

The plea was not involuntary even though induced by the filing of the habitual criminal charge. A threat or promise of illegal action may invalidate a plea, but a threat to prosecute when the facts warrant prosecution should not be considered coercive. Ford v. United States, *supra*.

The defendant did not admit that he was guilty of burglary, but did admit that he was found inside the building. Upon inquiry by the trial court, the county attorney stated that he believed he would be able to

obtain a conviction for burglary. The defendant's theory seemed to be that he would not be convicted upon trial because there was no evidence of a forced entry and nothing had been removed from the building at the time he was apprehended. These facts did not constitute a defense to burglary. Although it is the better practice to make a more complete inquiry into the factual basis for the plea, the record here is adequate to show that the trial court determined there was a factual basis for the plea.

The defendant complains that the trial court did not advise him specifically as to his privilege against self-incrimination, his right to trial by jury, his right to confront his accusers, and then obtain a waiver of each of these rights. The trial court did advise the defendant at length concerning his right to a jury trial or to a trial by the court; that no one could force him to plead guilty; and that no plea would be accepted which was not voluntary. The criteria is whether the defendant understood the relevant factors involved in a guilty plea. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The record here shows that the defendant's plea was voluntarily and understandingly entered.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN KECK, APPELLANT.
194 N. W. 2d 186

Filed February 4, 1972. No. 38197.

1. **Criminal Law: Sentences: Appeal and Error.** This court may reduce the sentence when in its opinion the sentence is excessive.
2. **Criminal Law: Sentences.** A technique for deterrence of crime is scaling of penal sanctions.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

On pleas of guilty the district court sentenced Steven Keck to imprisonment as follows: Count I, 7 days for possession of cannabis; Count II, 2 to 5 years for sale of cannabis; Count III, 2 to 5 years for possession of "LSD," lysergic acid diethylamide; and Count IV, 2 to 5 years for sale of "LSD." The sentences were concurrent. Keck appeals. He assigns excessiveness of the sentences for error.

The offenses occurred in February and March 1971, and the court sentenced Keck on June 2, 1971. The controlling statutes were former sections 28-472.03, 28-472.04, 28-487, 28-489(1), 28-497, and 28-498, R. S. Supp., 1969. They prescribed imprisonment of not less than 2 nor more than 5 years for the offenses charged in Counts II, III and IV of the information against Keck.

We summarize a presentence report and a postsentence classification of Keck at the penal and correctional complex. Born June 21, 1952, he quit school after completing one semester of the 10th grade. He has been on good terms with his parents, who attend church regularly. He is single.

The prior conviction record of Keck listed two offenses: Minor in possession of alcoholic liquor and contributing to the delinquency of a minor. A judge of a court of limited jurisdiction had held Keck in contempt of court for calling the judge a derogatory name.

A counselor reported on Keck: ". . . he accepts the idea of furthering his education enthusiastically . . .. Prognosis: good."

A psychological evaluation of Keck read: "There is

evidence of an emotional shallowness in his relationship to others. Keck is relatively free of conflicts and does not show anxiety until actually in serious difficulty. His behavior has been characterized by lack of concern and anxiety about potential dangers and punishments. Keck is further characterized by easy morals, readily circumvented conscience, and fluctuating ethical values. . . . He can easily become hostile and aggressive in his behavior towards others with little or no sense of guilt. Often he behaves . . . as if social regulations did not apply to him. . . . His powers of reasoning seem adequate and no clinical defects in judgment are evident. . . . Prognosis is fair, but questionable."

This court may reduce the sentence when in its opinion the sentence is excessive. § 29-2308, R. R. S. 1943; State v. Dixon, 186 Neb. 143, 181 N. W. 2d 250 (1970). A technique for deterrence of crime is scaling of penal sanctions. State v. Pope, 186 Neb. 489, 184 N. W. 2d 395 (1971).

The psychological evaluation with all the other circumstances is insufficient for us to classify Keck a danferous offender. We decrease the sentences on Counts II, III, and IV to imprisonment for 2 years. The sentences on the four counts remain concurrent. So modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissents.

NEWTON, J., concurring.

I concur in the opinion of Smith, J. Defendant was convicted and sentenced under section 28-472.04 (3), R. S. Supp. 1969, which fixed a penalty of not less than 2 nor more than 5 years imprisonment. The penalty has since been reduced to not less than 1 nor more than 5 years. See § 28-4,125, R. S. Supp., 1971. In view of the statutory change and the fact that defendant's previous record was good, a reduction in the sentence imposed appears justified.

STATE OF NEBRASKA, APPELLEE, V. VINCENT P. MELVIN, APPELLANT.
194 N. W. 2d 178

Filed February 4, 1972. No. 38218.

1. **Criminal Law: Sentences.** In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused.
2. **Criminal Law: Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

John E. Dier, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Gary R. Welch, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant, Vincent P. Melvin, and John G. Ryan were convicted of burglary upon pleas of guilty. The charges arose out of an offense on May 14, 1971, in which both men participated.

The defendant was sentenced to imprisonment for 1 to 2 years. Ryan was sentenced to imprisonment for 1 year. The defendant appeals, claiming that his sentence was excessive and should not have exceeded that imposed on Ryan.

In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused. In this case, the defendant's record of previous offenses justifies a more severe sentence than that imposed on Ryan.

Ryan had been fined for disorderly conduct, disturbing the peace, petit larceny, speeding on two occasions, and driving without an operator's license. On March 4, 1971, he had been placed on 6 months' probation for

breaking and entering an automobile.

The defendant had been charged with writing insufficient fund checks on three occasions and had been sentenced to jail on two occasions for periods of 7 days and 30 days. In January 1971, he was sentenced to jail for 4 months for burglary and placed on probation for 1 year for destruction of property. Apparently, the present offense was committed only a short time after he had been released from jail on the previous burglary charge.

The record does not show an abuse of discretion. The judgment of the district court is affirmed.

AFFIRMED.

MARY CORNELIA MARCUS, APPELLANT, V. MR. AND MRS. JAMES D. HUFFMAN, APPELLEES.
194 N. W. 2d 221

Filed February 10, 1972. No. 37995.

1. **Parent and Child: Infants.** The custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
2. ———: ———. Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by that relationship or has forfeited that right.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions.

Corrigan, Dowd & Naviaux, for appellant.

Robert T. Finn, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is a habeas corpus action in which the petitioner,

Mary Marcus, sought to recover possession of her infant son, Lawrence William Marcus, from the respondents, Mr. and Mrs. James D. Huffman. The district court for Holt County determined that Mr. and Mrs. Huffman should have custody of the child, denied the writ, and dismissed the case. The mother has appealed.

Petitioner Mary Marcus was married to one Tommy Marcus in California on October 13, 1967. Tommy Marcus is the son of Mrs. James D. Huffman, one of the respondents. Lawrence William Marcus, the child who is the subject of this controversy, was born on May 11, 1969. Andrew, an older illegitimate son of Mary Marcus, was adopted by Tommy Marcus after the 1967 marriage. On January 24, 1969, and prior to the birth of Lawrence William Marcus, Mary Marcus began divorce proceedings against Tommy Marcus in the Superior Court for San Diego County, California. Efforts at reconciliation under court supervision and otherwise followed and continued up to and after the birth of Lawrence. Some time prior to June 15, 1969, in connection with one of the efforts at reconciliation, Tommy Marcus made arrangements with his mother, Mrs. Huffman, to take the two children to Nebraska for a time while the Marcuses attempted reconciliation once more. They hoped thereafter to come to Nebraska and establish a home for themselves and the children. On June 15, 1969, James D. Huffman flew to Los Angeles. Mary Marcus and Tommy Marcus delivered the two children to him in the Los Angeles airport together with their clothing, and Mary Marcus advised him of the feeding habits of the children. James D. Huffman then brought both Marcus children back to O'Neill, Nebraska, together with a third child unrelated to any of them. Andrew Marcus at that time was a little over 3 years old and Lawrence was only a month old. The reconciliation efforts failed in approximately 2 weeks. Mary Marcus then borrowed some money from her mother and drove to O'Neill, Nebraska, with her 14-year-old sister

to get the children. They arrived on July 3, 1969. She went to the trailer house of the Huffmans in O'Neill, Nebraska, where she found Andrew playing in the yard and picked him up. She went into the house and told Mrs. Huffman that she had come for her children. Mrs. Huffman told her she could not have them, but she took Andrew anyway and started to drive back to her motel. She was arrested by the sheriff who advised her that she could be charged with kidnapping, but she was permitted to call her attorney in California. After some undisclosed discussions, the sheriff advised her that Mrs. Huffman had agreed that she could take Andrew but that she would be charged with kidnapping if she attempted to obtain Lawrence. Mary Marcus attempted to employ counsel in O'Neill, but was unable to do so. She then returned to California with Andrew.

On July 30, 1969, an interlocutory decree of divorce was entered by the Superior Court for San Diego County, California. That decree awarded Mary Marcus the care, custody, and control of the two children, restrained Tommy Marcus from having any contact with the minor children, and specifically provided that he should have no rights of visitation without specific order of the court. Final decree was entered July 22, 1970.

Mary Marcus testified that she telephoned on several occasions to inquire about the health of her son and to request his return. She had to leave messages at the trailer court for Mrs. Huffman to return the calls because she could not obtain the telephone number from the operator. Mr. Huffman testified that the Huffman telephone was changed to an unlisted number in June or July of 1969, because they had received many calls where there was only breathing on the other end of the line when they answered. Mary Marcus' telephone calls to the Huffmans were never returned or answered. She also wrote letters to the Huffmans on several occasions and telegraphed on several occasions. There was no response to her letters or telegrams. Mary Marcus sent

several gifts to Lawrence which were received by the Huffmans but there was no acknowledgment of them to her.

This action was begun on September 1, 1970, and order entered directing the issuance of the writ for production on September 4, 1970. Mary Marcus Townsend again came to Nebraska for the hearing on September 4, 1970, but the Huffmans had previously departed with Lawrence for a vacation in Arkansas. She returned again in October for this hearing.

At an undisclosed age somewhere between 11 and 14, Mary Marcus attempted suicide by slashing her wrists. At approximately age 16, she was kept in a juvenile home for 2 or 3 days for possession of a marijuana cigarette. At age 16, she became the mother of Andrew, an illegitimate child. She lived with Tommy Marcus before their marriage on October 13, 1967, when she was 17 years old. After the birth of her first child, she completed her high school education at an adult public high school in San Diego. This history of Mary Marcus' background prior to her marriage to Tommy Marcus comes solely from the testimony of Mary Marcus.

The only testimony other than her own relating to Mary Marcus' fitness to have the custody of her child came from Mr. Huffman. Mr. Huffman testified that on one occasion, a week or two after the birth of Lawrence when the Huffmans were visiting in the home of the Marcuses in May 1969, Mrs. Huffman got up and fed the baby and Mary Marcus stayed in bed until afternoon. On another occasion, Mary Marcus left the two children for approximately 20 to 30 minutes while she attempted to get Tommy Marcus to assist in caring for them. Mary Marcus married her present husband Richard Townsend, in Mexico on February 29, 1970, before the entry of her final decree of divorce, and remarried him in California on August 11, 1970.

The evidence is clear that Andrew, the older son of Mary Marcus, was clean, well-behaved, well-dressed, and

well-fed. Mr. Huffman conceded that was true in June of 1969, at the time he took possession of the children. At the time of trial in the fall of 1970, Andrew was approximately 4½ years old, and still in the custody of his mother. The evidence is undisputed that the apartment of the Townsends in California is adequate and attractive. Mr. Townsend is employed as a truck driver. Mary Marcus Townsend is a long distance telephone operator.

The evidence is also undisputed that the trailer house of the Huffmans is adequate and attractive and that they have provided a good home for Lawrence. Mr. Huffman was a construction inspector for the Bureau of Reclamation in the power transmission division. The evidence does indicate that Mr. Huffman is gone from home approximately 50 percent of the time except on weekends. The neighbors in O'Neill who testified had known the Huffmans for approximately 2 years. The Huffmans were married in 1963. Mrs. Huffman was divorced from a prior husband in 1961 or 1962, and had a daughter who was 10 years old at the time of trial.

Certain related and collateral facts are material and relevant. In the fall of 1969, the Huffmans filed a petition for their appointment as guardian of the person and property of Lawrence Marcus in the county court of Holt County, Nebraska. Decree was entered and appointment was made. Mary Marcus received no notice of the proceedings and none was published. Sometime in 1970, the Huffmans filed a petition for adoption. The grounds for adoption were abandonment. The petition, verified by James D. Huffman, contrary to his testimony in this action, asserted that Lawrence Marcus had been abandoned in the Los Angeles police department, and that Mr. Huffman had acquired him there. No relinquishment was filed from either parent. The adoption proceeding was later dismissed.

It is also noteworthy that Mrs. Huffman, although present in court for 2 days of the hearing, did not testi-

fy nor did Tommy Marcus testify although his actual appearance in court is not reflected by the record.

The district court found that Mary Marcus had not taken a real interest in her child as a natural mother would or should; that she had forfeited her preferential right to the custody of the child; and that she was not a fit and proper custodian for the child. The court thereupon denied the writ of habeas corpus and dismissed the case.

There is no question but that the governing rule is that the custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581.

Counsel for the respondents have vigorously asserted that because this is a habeas corpus action, the petitioner has the burden to establish fitness to perform the duties imposed by the parental relationship, even though the petitioner is the parent. They also argue that a parent must establish that the best interests of the child will be better served by the parent than by strangers. We cannot agree.

It is clear from our decisions over a long period of time that courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by that relationship or has forfeited that right. Ball v. Ball, 180 Neb. 145, 141 N. W. 2d 449; Hausman v. Shields, *supra*.

The respondents argue that the teenage premarital conduct here makes Mary Marcus permanently unfit to have custody of a child. That argument is unsupportable. If such a position were to be adopted by the courts, millions of parents would stand in danger of having their parental rights challenged.

The argument also completely disregards the fact that the California court granted exclusive custody to Mary Marcus, who was continuously a resident of California

and still is. There is no evidence to warrant the upsetting or reversal of that decree. While the decree may not be binding upon a Nebraska court, it is at least entitled to due weight, even if it is not accorded full faith and credit.

The evidence here is wholly insufficient to establish an abandonment of her child by Mary Marcus, nor a forfeiture of her parental rights. She borrowed the money from her mother to make the first trip to Nebraska to reclaim her children less than 3 weeks after the children were first brought to Nebraska. She was arrested and threatened with a charge of kidnapping if she attempted thereafter to take her child. She was unable to retain counsel in O'Neill, Nebraska, and was forced to return to California with only one of her children. She continued in her efforts to regain her other child by telegraph, telephone, and letters and all were unsuccessful. Following her remarriage, with the assistance of her new husband, she was able to retain counsel in Omaha, Nebraska, and commenced this action. She was required to return to Nebraska twice more before she could obtain a hearing upon her petition.

Meanwhile, the Huffmans, who always knew who and where the child's parents were, had completed proceedings for guardianship of the person and property of Lawrence Marcus, without notice to Mary Marcus and without any parental consents or relinquishments from either Mary Marcus or Tommy Marcus. It might be said that Mary Marcus continued the fight to regain the custody of her child against imposing obstacles. To say the least, the evidence flatly contradicts any assertion of abandonment or voluntary forfeiture of her parental rights.

The facts and circumstances here would be wholly insufficient to justify the State of Nebraska in attempting to take the child from the custody of Mary Marcus in a juvenile proceeding. If the State of Nebraska could not remove the custody of her child because of her premarital conduct, certainly a stranger should stand in

no better position. Even if her delivery of the child to Mr. Huffman in June of 1969 were treated as an act of relinquishment performed under circumstances of distress or discouragement, her right to the custody of her child was not lost beyond recall. Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783.

The evidence here was simply insufficient to establish that Mary Marcus Townsend was unfit to perform the duties of a parent or that she had forfeited that right.

The judgment of the district court is reversed and the cause remanded with directions to grant the writ of habeas corpus and return the custody of Lawrence Marcus to Mary Marcus Townsend.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., participating on briefs.

SMITH, J., concurring.

The majority opinion discourages continuing controversies over child custody. I would adapt the Uniform Child Custody Jurisdiction Act generally for judicial use at least on the basis of comity. The adaptation harmonizes with the majority opinion which properly respects the California decree. I concur that Lawrence' needs for a stable environment and a secure family relationship require return to his mother. See, 1968 Handbook of the National Conference of Commissioners on Uniform State Laws, 198 (1968); Bodenheimer, "The Uniform Child Custody Jurisdiction Act; A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand. L. Rev. 1207 (1969).

This court has been vigilant to protect property rights of minor children. See, Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186 (1959), 174 Neb. 471, 118 N. W. 2d 764 (1962). It ought to be no less vigilant respecting their personal rights. I would promulgate this prospective rule: In a custody proceeding, the trial court must appoint counsel for minor children. See, generally, Coyne, "Who Will Speak for the Child?" 383 Ann. Am. Ac. Pol. & Soc. Sc. 34 (1969); Inka and Per-

retta, "A Child's Right to Counsel in Custody Cases," 5 A.B.A. Family L. Q. 108 (1971); Kleinfeld, "The Balance of Power Among Infants, Their Parents and the State," 4 A.B.A. Family L. Q. 320, 409 (1970), 5 A.B.A. Family L. Q. 1, 64 (1971).

BOSLAUGH, J., dissenting.

The trial court found that the petitioner, the natural mother, had forfeited her preferential right to the custody of Lawrence William Marcus and awarded the custody to Mr. and Mrs. James D. Huffman. Mrs. Huffman is the paternal grandmother of Lawrence. The majority opinion holds the evidence insufficient to sustain that finding and awards the custody to the petitioner.

The record in this case leaves much to be desired. This may be due in part to the fact that the petition was filed on September 1, 1970, while the respondents were in Arkansas on vacation. The respondents returned to Nebraska on September 20, 1970. The alias writ was served on Mrs. Huffman on September 23, 1970. The hearing commenced on October 6, 1970.

The petitioner's case consists entirely of her testimony. The respondent's case is largely the testimony of James D. Huffman. His testimony is corroborated in part by testimony of the other witnesses called by the respondents. It is significant that the trial court who saw and heard the testimony of the petitioner found against her.

The petitioner has a history of what might be described as serious instability. She freely admitted that she had lived with her former husband, the father of Lawrence, before they were married, and had married Richard Townsend in Mexico before her divorce was final. She claimed a misunderstanding of the terms of her California divorce, but continued to use the name Marcus long after the marriage in Mexico. As I view the record, the evidence sustains the finding of the trial court.

The record indicates that Lawrence, when first brought to Nebraska, appeared to be nervous and insecure. Dur-

ing the time that he has been with the respondents this condition has gradually improved and he now appears to be well adjusted and a normal child. The result of our decision in this case is to return Lawrence to an environment that is less than satisfactory. I do not agree that this satisfies his need for a stable environment and a secure family relationship.

SPENCER, J., joins in this dissent.

WHITE, C. J., dissenting.

I join fully in the dissent of Judge Boslaugh herein. This is a habeas corpus action between the mother and the paternal grandmother and her husband. The care and custody of Lawrence William Marcus was voluntarily granted by the mother prior to the time of both an interlocutory and final divorce decree in the State of California. Lawrence William Marcus has been in Nebraska and has been cared for in this state for a period of approximately 2½ years since that time.

I feel it is necessary that we keep clearly in mind the precise rules of law that this court has laid down applicable to this situation. It is sometimes difficult to distinguish betwen the rules applicable in a habeas corpus action of this nature and the closely related rules that apply in a divorce proceeding or otherwise found in custody proceedings in this state. These questions were resolved in Reed v. Reed, 152 Neb. 819, 43 N. W. 2d 161. In that case, the mother, in a habeas corpus action against the father and paternal grandparents, urged the finality of a Kansas divorce decree finding her a fit and proper person for the custody of her child and awarding the custody to her. After holding under the facts in that case the divorce decree was not entitled to full faith and credit in a habeas corpus proceeding in this state and the fact alone that the custody of a minor child has been awarded in an action in another state does not prevent inquiry into the question in a proper action by a court subsequently acquiring jurisdiction of the parties in this state, this court stated as follows: "To

give full faith and credit to the decree of the Wyandotte County district court in awarding the custody of the child to its mother in the case before us would be contrary to the laws and public policy of this state where the enforcement thereof is sought. There is a further reason that full faith and credit should not be given the Kansas decree awarding the custody of the child to its mother. The best interests of the child and its future welfare under all circumstances is the vital question in the case and is superior to all other considerations where the question is raised upon a writ of habeas corpus."

In the Reed case, and in numerous cases following and affirming its holding, this court has consistently held that after the court's jurisdiction has been invoked by habeas corpus the child is a ward of the court and its welfare lies in the hands of the court. This power and responsibility is based upon the basic principle that the jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents, but has its origin in the protection that is due the incompetent or helpless. The historic jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the wishes of the parents, or the domicile of the child, but it arises out of the power that every state possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants.

The Reed case has never been overruled and has been followed successively in its various pronouncements with reference to the fundamental jurisdiction and duties of the court in the following cases, the latest of which was in 1971. They are as follows: Copple v. Copple, 186 Neb. 696, 185 N. W. 2d 846; Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581; Green v. Green, 178 Neb. 207, 132 N. W. 2d 380; State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615; Jones v. State, 175 Neb. 711, 123 N. W. 2d 633; Osterholt v. Osterholt, 173 Neb.

683, 114 N. W. 2d 734; Walker v. Gehring, 172 Neb. 398, 109 N. W. 2d 724; State ex rel. Hamilton v. Boiler, 159 Neb. 458, 67 N. W. 2d 426; Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525; Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; Lung v. Frandsen, 155 Neb. 255, 51 N. W. 2d 623; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383.

Of course, it is true, that the district court and this court are required to give due regard, as one of the considerations involved, to the natural rights of a mother who is a fit and proper person to have the custody and care of a child of tender years. It is further true, and this court has constantly reaffirmed the proposition, that the custody of a child of tender years cannot be wrenched away from a parent on the basis that somebody else can furnish a better home on a comparative financial basis. Nevertheless, we have adhered consistently to the rule, in a controversy for the custody of an infant of tender years in a habeas corpus proceeding, that the court will consider the interest of the child, and will make such order for its custody as will be best for its welfare, without reference to the mere wishes of the parties. Reed v. Reed, *supra*.

The majority opinion summarily reverses the discretion of the district court in this case, removes Lawrence William Marcus from a secure and loving home environment that he has been raised in for 2½ years since his early infancy, and sends him back to California without the retention of any power to supervise, to control, or to review the needs and the welfare of this small boy. In order to do so, under our decisions, it becomes necessary, and that is implicit in the majority opinion, to hold that the trial judge, who saw and observed the witnesses, and observed their demeanor and conduct in the courtroom, committed an abuse of discretion in retaining jurisdiction of this child for the time being and permitting it to remain with the people who have given it the love, attention, and care of a fine home during the

critical period when no one else was able or willing to do so.

The majority opinion is a persuasive and exhortatory appeal to a basic human emotion, the love and devotion of a mother for a child. However, an examination of the record in this case reveals significant facts directly relating to the welfare and best interest of Lawrence William, which indicate to me the good judgment of the district judge and demonstrate conclusively that he did not abuse his discretion in permitting the child to continue in the fine home with the loving care he is now getting, and retaining the court's jurisdiction to control and supervise the welfare of Lawrence William. Some of these facts are as follows: (1) Mary, the mother, is 20 years of age. What is her record of stability, responsibility, and morality since she reached the age of responsibility? (2) At the age of 16 she had her first child, illegitimate, born out of wedlock. (3) She was expelled from high school for having in her possession a drug. (4) It was necessary for the authorities to place her in a juvenile home not once, but twice; once for possession of drugs and once for running away from her home. (5) She lived with the father of Lawrence William, Tommy Marcus, before they were married and she has lived and resided with Richard Townsend, her present husband, during the period that she was married to Tommy Marcus, and for a long time before the final divorce decree on July 22, 1970. After knowing her present husband for a period of 1 month, she went to Mexico and engaged in a marriage ceremony with him in violation of the provisions of the California interlocutory decree. (6) Her present husband is 28 years of age and has been previously married; his wife was granted the divorce and given the custody of their minor child; he never sees this child; and does not make any child support payments toward the support of his own child. All of this appears from the mother's testimony herself. (7) Her first-born illegitimate child was only

in her possession, care, custody, and control for a period of 6 months during the first 2½ years of the child's life. (8) Lawrence William was born May 11, 1969; he has only been in her possession for a period of about 1 month since he was born. (9) By her own admission, she has attempted to commit suicide and demonstrated to the trial court the marks on her wrists resulting from that experience. (10) The evidence strongly supports the finding that during the period of about 1 month after Lawrence Williams' birth when she had possession of the child, he was not properly and adequately taken care of. She voluntarily relinquished the child to the Huffmans, and the evidence supports the finding that the child had a diaper rash, couldn't keep any food in his stomach, was unstable, was nervous, and was hyperactive. (11) The evidence, including medical, conclusively establishes that Lawrence William is a well-cared for, stable child and has developed into such after being with the Huffmans for the past 2½ years. It shows that from a highly nervous, "fussy," and unstable child, he has developed into a happy, normal child with all of the care, love, and attention of a fine home. There is testimony in the record and before the trial judge that the child's improvement since being with the Huffmans has been "fantastic" and that he is content and is secure. This testimony is corroborated by neighbors and friends of the Huffmans who have had an opportunity to observe the child during the period involved. The doctor's testimony in this case is that a change in environment would disturb Lawrence William. His testimony is to the effect that at the time he first saw the child on August 5, 1970, after the Huffmans brought him to O'Neill, he was hyperactive, nervous, and with excessive motion in his arms and legs. Friends and neighbors testified that since Lawrence has been with the Huffmans, he has become stable, is calm, and it appears to them that he is well-loved, well-nourished, and well-kept; and further that he was clean and

seemed to respond favorably to Mrs. Huffman, his grandmother.

In light of these circumstances, the record in this case falls far short of showing an abuse of discretion by the trial court in making the determination that it did. This is not a case of wrenching a child from a close and normal attachment to its natural mother that has developed over a period of time and granting the custody to some stranger merely because he is able to give it better, more convenient, and more luxurious surroundings. The disposition of the trial court was not on a comparative financial or comfort basis. It was directly related to the well-being and the best interest of Lawrence William, and based upon sound judgment with reference to the future of the child and the precarious nature of propelling it back into an unknown and previously unstable environment with a new "father" who fails to even support his own child. I am firmly of the conviction that considering the primary question before us, and that is the best interests of the child, the mother here has failed to demonstrate, under all of the circumstances, the minimum fitness from the standpoint of the stability of a proper home for a child, from the standpoint of a moral background, the capacity to adequately and physically take care of the child and give it the close attention and care a child of Lawrence Williams' age needs. In reaching these conclusions I am aided by the rule which we have unceasingly followed in this court, one particularly applicable in a child custody case, that a trial judge's discretion should not be interfered with except in rare circumstances in a custody proceeding because the trial judge saw and heard the witnesses, and observed their demeanor and conduct when testifying. His judgment in these circumstances should be given great weight and his discretion should not be overturned unless it appears to this court, on trial de novo, that the disposition was arbitrary,

capricious, unreasonable, and not supported by the evidence.

I am particularly fearful of the disposition and judgment in this case, because they make no recognition of the court's duty to supervise the prospective care of Lawrence William. Lawrence William is a ward of the court and his welfare lies in the hands of the court. Reed v. Reed, *supra.* The testimony of Mary Marcus, the relator, is entirely uncorroborated, furnished the court without even the appearance or the deposition of her present husband, Richard Townsend. No provision is made to retain the district court's power to order an independent investigation of her circumstances and home conditions in California through the welfare authorities, a device used by courts in order to properly exercise their jurisdiction in custody matters.

SPENCER and BOSLAUGH, JJ., join in this dissent.

CLINTON, J., concurring.

The record clearly shows without contradiction that care of Lawrence William Marcus was temporarily entrusted to the Huffmans and some 3 weeks later they unjustifiably and wrongfully refused to return the child to his mother. This refusal was without color of right.

The dissenting opinions pay lip service to the principles regarding the natural rights of the parent but completely disregard them. They imply the state is all-powerful as far as child custody is concerned.

If the dissents correctly state the law then if I should leave my child with a babysitter, the babysitter may if she wishes refuse to return my child to me and I must resort to habeas corpus, and the court may in such action determine the parent's fitness as compared with that of the sitter.

Habeas corpus is not the appropriate vehicle in which to make such a determination. The Huffmans should gain no right through their wrongful refusal. In cases such as this the only issue should be whether the refusal to deliver the child was wrongful.

It is tragic that this case has taken so long to come to a conclusion. This is in some meaure owing to the inability of the mother to procure counsel and legal service when her possession of her child was wrongfully denied her. Counsel who ultimately took the case and fought her battle and that of the child is to be highly commended.

Delay in cases of this kind is intolerable. Disposition of such cases should be given priority by the courts and all concerned.

JOHN B. HEAVICAN, APPELLANT, V. EUGENE ARTHUR HOLBROOK, APPELLEE.
194 N. W. 2d 208

Filed February 10, 1972. No. 38021.

1. **Courts: Instructions: Pleadings: Evidence.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence.
2. **Trial: Ordinances: Pleadings: Evidence.** A party must plead and prove the existence of a municipal ordinance in order to have the benefit of the ordinance.
3. **Traffic Controls: Motor Vehicles: Statutes: Ordinances.** In the absence of a statute or ordinance, the meaning to be given to a traffic control signal is that which a reasonably prudent motorist would understand and apply.
4. **Traffic Controls: Motor Vehicles: Negligence.** As a general rule, a motorist who enters an intersection when the signal is in his favor is entitled to continue through the intersection even though the signal changes after he has entered the intersection.
5. ———: ———: ———. A motorist intending to make a left turn at an intersection, where left turns are controlled by a separate traffic signal light, may enter the intersection on a favorable signal and complete the turn even though the signal changes after he has entered the intersection.
6. ———: ———: ———. A motorist intending to make a left turn, who would otherwise have the right-of-way over through traffic, may lose the right-of-way by stopping in the intersection and yielding the right-of-way to through traffic before completing the turning movement.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded.

S. J. Albracht and Michael P. Cavel of Lathrop, Albracht & Dolan, for appellant.

Joseph Meusey of Fraser, Stryker, Marshall & Veach, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This action arose out of an automobile accident. The jury found that neither party should recover. The plaintiff appeals. There is no cross-appeal. The assignments of error relate to the instructions to the jury.

The accident happened at about 9:15 p.m., on April 4, 1968, at the intersection of Dodge Street and Seventy-second Street in Omaha, Nebraska. Dodge Street runs east and west. Seventy-second Street runs north and south. The weather was clear and the streets were dry. The plaintiff was driving north intending to proceed on Seventy-second Street through the intersection. The defendant was driving south intending to turn left and proceed east on Dodge Street.

Both streets have multiple lanes, including left turn lanes, with opposing traffic separated by islands or medians. The intersection is controlled by traffic signals with lights which appear in this sequence: Red; red with left turning green arrow; green; and yellow.

On the south side of the intersection there are four lanes approaching the intersection. The extreme right lane is for traffic intending to turn right. The next two lanes are for through traffic intending to proceed north on Seventy-second Street. The fourth lane is for traffic intending to turn west onto Dodge Street. On the north side of the intersection there are three lanes approaching the intersection, a left-turning lane and two regular traffic lanes.

The amended petition alleged that the defendant was negligent in failing to keep a proper lookout; in failing to keep his automobile under proper control; in turning in front of the plaintiff without ascertaining whether it was safe to do so; and in making a left turn contrary to section 35.28.150 (e) of the Omaha ordinances.

The answer alleged that the plaintiff was negligent in failing to maintain a proper lookout; in failing to maintain reasonable control of his automobile; in entering the intersection when the traffic light was red; in failing to yield the right-of-way to the defendant; and in operating his vehicle at an excessive speed.

The plaintiff testified that he approached the intersection in the through-traffic lane second from the right; that the traffic light was green; that there was another automobile in the same lane 2 car lengths or more ahead of him; that after he had entered the intersection the defendant's automobile "darted" in front of him; that he swerved to the right and didn't have time to apply his brakes; that the impact occurred; and that he was injured.

The defendant testified that he approached the intersection from the north in the left-turn lane; that he used his left turn signal to signal his intention to make a left turn; that there were two or three cars ahead of him; and that the traffic light was red. When the traffic light changed to the green arrow, the automobiles ahead of the defendant entered the intersection and made left turns. The defendant followed these automobiles into the intersection and then stopped because the traffic light had changed to green for through traffic. After the traffic light had changed to red for northbound traffic, the defendant started to make his turn. The defendant first saw the plaintiff's automobile when it was 5 or 10 feet away. The front of the defendant's automobile was then in the through-traffic lane first from the right for northbound traffic. The evidence was in conflict and presented questions for the jury.

The plaintiff contends that the trial court erred in instructing the jury in reference to section 35.28.150 of the Omaha ordinances without also instructing in reference to the other ordinances relating to left turn traffic signals.

The general rule is that a party must plead and prove the existence of a municipal ordinance in order to have the benefit of the ordinance. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Chicago Lumber Co. v. Gibson, 179 Neb. 461, 138 N. W. 2d 832. Here the plaintiff failed to plead or prove the ordinances relating to left turn traffic signal lights. As a consequence, the trial court had no duty to instruct the jury in reference to the ordinances.

The plaintiff further contends that the second paragraph of instruction No. 15, which read as follows, was erroneous:

"The driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn."

The instruction given was based upon section 39-751, R. R. S. 1943, prior to its amendment in 1969 and 1971. See § 39-751, R. S. Supp., 1969, and § 39-751, R. S. Supp., 1971. At the instruction conference held in chambers, the plaintiff objected to instruction No. 15 and advised the trial court that he did not believe the second paragraph was applicable to the intersection involved in this case.

The effect of the instruction as given was to advise the jury that the plaintiff was required to yield the right-of-way to the defendant if the plaintiff had not entered the intersection and the defendant was in the intersection turning across the plaintiff's line of travel and had signaled his intention to turn. The instruction as given was misleading and not applicable to the facts

in this case unless qualified by other instructions to reflect the particular circumstances in this case.

The trial court instructed the jury generally in reference to the rules of the road at intersections controlled by traffic signal lights. None of the instructions given related specifically to the left turn traffic signal light at the intersection.

We have no statutes specifically relating to left turn traffic signal lights, but local authorities are authorized to regulate traffic by signaling devices. § 39-767, R. R. S. 1943. In the absence of a statute or ordinance, the meaning to be given to a traffic control signal is that which a reasonably prudent motorist would understand and apply. Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329.

The purpose of the left turn signal light here was to separate traffic turning left from through traffic. Thus, when the green arrow was lighted, traffic in the left turn lane was authorized to enter the intersection for the purpose of making a left turn. When the green arrow was not lighted, traffic in the left turn lane was not authorized to enter the intersection. The jury should have been instructed to this effect. It is the duty of the trial court to instruct the jury as to the issues presented by the pleadings and evidence. Zavoral v. Pacific Intermountain Express, *supra*.

As a general rule, a motorist who enters an intersection when the signal is in his favor is entitled to continue through the intersection even though the signal changed after he entered the intersection. Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251. The rule is applied generally to motorists entering the intersection on a left turn signal. Sibley v. Aetna Casualty & Surety Co., 163 So. 2d 464 (La. App.); Potts v. United States Fidelity & Guaranty Co., 135 So. 2d 77 (La. App.); Lasnetske v. Parres, 148 Colo. 71, 365 P. 2d 250. The right-of-way of the left turning motorist over through traffic entering on the green signal, however, exists only if the mo-

torist making the left turn entered the intersection on a favorable signal and the turning movement is continuous.

In this case the defendant testified that after the green arrow came on he followed two or three cars into the intersection but stopped because the green arrow was off and through traffic had entered the intersection. In Thomas v. Owens, 169 Neb. 364, 99 N. W. 2d 611, a case which arose out of a similar accident at the same intersection, this court said that the jury could find that a vehicle making a left turn, while moving very slowly and maintaining a position away from the line of travel of through traffic, had yielded the right-of-way to through traffic. The rule is applicable here where the defendant had stopped in the intersection and did not commence the turning movement until the plaintiff was entering or was about to enter the intersection.

Under the circumstances in this case, if the plaintiff entered the intersection on the green light, as he testified, he was not required to yield the right-of-way to the defendant who had stopped and yielded the right-of-way to through traffic. The failure to instruct with reference to the left turn traffic signal light permitted the jury to find that the defendant had the right-of-way over the plaintiff even if plaintiff had entered the intersection on the green light.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN J. MORITZ ET AL., APPELLANTS, V. GEORGE J. BUGLEWICZ ET AL., APPELLEES, GINN IOWA OIL COMPANY, INTERVENER-APPELLEE.
194 N. W. 2d 215

Filed February 10, 1972. No. 38039.

1. **Constitutional Law: Property: Eminent Domain.** The Constitution of Nebraska does not permit the taking of private property for a private use.

2. **Highways: Statutes.** A road established pursuant to section 39-1713, R. R. S. 1943, is a public road.
3. **Property.** Public policy favors the full utilization of land.
4. **Highways: Statutes: Constitutional Law.** Section 39-1713, R. R. S. 1943, which provides a procedure for establishing a public road to isolated land is constitutional.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart and Gerald P. Laughlin, for appellants.

Donald L. Knowles and Jerry M. Slusky, for appellees.

Gaines, Spittler, Neely, Otis & Moore, for intervener-appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The Ginn Iowa Oil Company, the intervener, owns an irregular tract of land near Eighty-fourth and Frederick Streets in Omaha, Nebraska. The tract is bounded by Big Papillion Creek, land owned by the City of Omaha, and land owned by John J. Moritz and Marion J. Moritz, the plaintiffs. There is no access to any public road from the intervener's land, but at one point the land lies within approximately 5 feet of Frederick Street.

The intervener commenced proceedings under section 39-1713, R. R. S. 1943, to establish a public road across the plaintiff's property which would provide access to its land. The plaintiffs then commenced this action to enjoin the members of the County Board of Douglas County, Nebraska, from proceeding under the statute. The trial court found against the plaintiffs and they have appealed.

The issue presented is the constitutionality of the statute. The plaintiffs contend that the road which would be established would be for the private use of the intervener and would amount to a taking of the

plaintiffs' property for a private use. The Constitution does not permit the taking of private property for a private use. Welton v. Dickson, 38 Neb. 767, 57 N. W. 559; Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N. W. 547.

Unlike the statute involved in Welton v. Dickson, *supra*, section 39-1713, R. R. S. 1943, provides for the establishment of a public road. Sections 39-1713 and 39-1716, R. R. S. 1943, provide specifically that the road established shall be a public road.

The fact that the intervener would be the principal user of the road does not make it a private road. "Whether a way be public or private does not depend upon the number of people who use it, but upon the fact that every one may lawfully use it who has occasion." Sherman v. Buick, 32 Cal. 241. See, also, State ex rel. Happel v. Schmidt, 252 Wis. 82, 30 N. W. 2d 220.

It is in the public interest that no land be unoccupied. Dillman v. Hoffman, 38 Wis. 559; Condry v. Laurie, 184 Md. 317, 41 A. 2d 66. The public policy that favors the full utilization of land, and supports the doctrine of ways of necessity, supports the constitutionality of the statute in this case.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GORDON MIDDLETON, APPELLANT.

194 N. W. 2d 568

Filed February 10, 1972. No. 38180.

1. **Criminal Law: Witnesses: Evidence: Juries: Appeal and Error.** The credibility of witnesses and the weight of evidence are for the jury to determine in a criminal case, and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.
2. **New Trial: Trial: Instructions: Appeal and Error.** The correctness of the ruling of a district court in giving or refusing in-

structions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

3. **Criminal Law: Sentences.** A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant was tried and convicted by a jury on charges of possession and sale of a narcotic drug, cocaine, under the pertinent provisions of sections 28-451 to 28-472.06, R. S. Supp., 1969. Said sections have since been repealed and now have been replaced by the Uniform Controlled Substances Act, sections 28-4,115 to 28-4,142, R. S. Supp., 1971. Defendant was sentenced to concurrent terms of 3 to 5 years on each count.

Three issues are raised on appeal: (1) Sufficiency of the evidence to sustain the conviction; (2) refusal to give a requested instruction; and (3) excessiveness of the sentence.

We have carefully reviewed the record. The evidence is clearly sufficient to support the jury's verdict. The record presents only questions of credibility. These were for the jury to determine and resolve.

The issue of the refusal to give the requested instruction was not raised in the motion for new trial. The requested instruction did not pertain to an issue of proof of an element of the crime or defense, but only as to whether the testimony of a paid special investigator was to be weighed with more care than in the case of a wholly disinterested witness. The matter not having

been mentioned in the motion for new trial cannot be considered by this court. State v. Tolle, *post*, p. 823, 194 N. W. 2d 567.

The sentence imposed is severe but we cannot say it is excessive or the trial court abused its discretion. Sentence provided by the pertinent statute is "not less than two years nor more than five years." § 28-470, R. S. Supp., 1969. The defendant was sentenced on May 24, 1971. After his conviction and sentence the statute, as we have noted, was repealed and replaced. Under the new act the penalty for possession is 1 to 2 years. The penalty for distributing, which is the offense under the new statute corresponding to the crime of sale under the old, is 5 to 20 years. § 28-4,125(2) and (3), R. S. Supp., 1971.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM TOLLE, APPELLANT.
194 N. W. 2d 567

Filed February 10, 1972. No. 38182.

1. **Criminal Law: Evidence: Appeal and Error.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilty beyond a reasonable doubt.
2. **Motions, Rules, and Orders: New Trial: Appeal and Error: Instructions.** An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions.
3. ———: ———: ———: ———. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

Joseph D. Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

A jury found defendant guilty of the unlawful sale of marijuana. He received an indeterminate sentence of imprisonment for 2 to 5 years. We affirm the judgment of conviction but reduce the sentence.

As assignments of error, defendant charges the evidence is insufficient to sustain the conviction, the failure to give a requested cautionary instruction regarding the testimony of private detectives, and excessiveness of the sentence.

The evidence was conflicting but two witnesses testified to the sale of marijuana by the defendant. A jury question was presented which was resolved unfavorably to defendant. We cannot agree that the evidence was materially lacking in probative force. "In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Goodwin, 184 Neb. 537, 169 N. W. 2d 270.

Defendant's motion for new trial assigns as error "errors of law occurring at the trial," but fails to mention the failure to give the requested cautionary instruction. Under such circumstances, this assignment cannot be considered on appeal. "An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions." Drucker v. Goscar, Inc., 184 Neb. 475, 168 N. W. 2d 534. See, also, Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231. "The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged

in the district court by motion for a new trial." Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224. See, also, Miller v. State, 173 Neb. 268, 113 N. W. 2d 118; State v. Gau, 182 Neb. 114, 153 N. W. 2d 298.

Defendant was convicted and sentenced under section 28-472.04 (3), R. S. Supp., 1969, which fixed a penalty of not less than 2 nor more than 5 years imprisonment. The penalty has since been reduced to not less than 1 nor more than 5 years. See § 28-4,125, R. S. Supp., 1971. In view of the statutory change and the fact that defendant's record was good prior to the commission of this offense, the sentence is modified or reduced to imprisonment for not less than 1 year nor more than 5 years.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

IN RE APPLICATION OF FARMERS IRRIGATION DISTRICT AND SUN OIL COMPANY FOR ENTRY OF A COMPULSORY POOLING ORDER AS TO PRODUCTION FROM GOVERNMENT LOT 3, SECTION 18, TOWNSHIP 22 NORTH, RANGE 53 WEST OF THE 6TH P.M., SCOTTS BLUFF COUNTY, NEBRASKA, IN THE NORTH MINATARE FIELD.

FARMERS IRRIGATION DISTRICT ET AL., APPELLANTS, V. LEO SCHUMACHER ET AL., APPELLEES.

194 N. W. 2d 788

Filed February 18, 1972. No. 37956.

1. **Oil and Gas: Statutes: Words and Phrases.** Chapter 57, article 9, R. R. S. 1943, contemplates that a determination of the correlative rights of adjoining owners in a pool of oil or gas shall be determined on a fair, reasonable, and equitable basis.
2. **Oil and Gas.** Correlative rights must be determined and fixed on the basis of circumstances present in each individual case.
3. ———. A pooling order allocating shares in the production of a well, and costs encountered, may be made retroactive when equity and justice require.

4. ———. Ordinarily an adjoining owner is not justified in awaiting the successful outcome of drilling operations before entering into a pooling agreement or applying for a pooling order.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. Reversed and remanded with directions.

Robert J. Bulger, for appellants.

Lyman & Meister, Howard P. Olsen, and Frank Glebe, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This case arises out of an application of the appellants, Farmers Irrigation District et al., to the Nebraska Oil and Gas Conservation Commission for entry of a compulsory pooling order as to oil production from Government Lot 3, Section 18, Township 22 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska, located in what is known as the North Minatare Field. The application was filed January 16, 1967, and asks that the pooling order be made retroactive to October 15, 1964, the date of commencement of production from a well, known as the White Feather Petroleum Company, Inc., Emery No. 2, drilled on Government Lot 3. The commission entered a pooling order; determined the allocation between the two separate leases which cover a separate portion of Government Lot 3; made the allocation effective as to all production subsequent to October 15, 1964; and charged the working interest owners in the two leases with their allocated shares of all drilling completion, storage, supervision, transportation, and other costs necessary to the well. The appellees appealed to the district court for Scotts Bluff County, which court after trial reversed the order of the commission and determined that the Farmers Irrigation District and its lessee, Sun Oil Company, did not prove the facts

and allegations contained in their application to the commission and that any minerals owned by the Farmers Irrigation District and its lessee "cannot be pooled." We reverse the judgment of the district court and remand the cause with directions to the district court to affirm the order of the commission.

The Farmers Irrigation District is the owner of a strip of land 150 feet wide extending across the south part of Government Lot 3. This strip appears to contain approximately 4.19 acres. Sun Oil Company holds an oil and gas lease covering this tract. No well was drilled thereon. The appellees, other than White Feather Petroleum Company, Inc., are the owners of the balance of Government Lot 3, containing about 43.92 acres. White Feather is the holder of the oil and gas lease on that tract. White Feather drilled a producing well in the approximate center of Government Lot 3 which became productive about October 15, 1964. On about December 22, 1964, Sun gave notice to White Feather and others of its lease and claimed a proportionate share of the production from the Emery No. 2 well. Appellees then disputed ownership of appellants' land and thereby questioned their right to any of the oil produced. This resulted in the filing of an action on August 27, 1965, to determine ownership of the land. The action was decided in favor of appellees and reversed on appeal to this court. See Sun Oil Co. v. Emery, 183 Neb. 793, 164 N. W. 2d 644, decided January 31, 1969. Proceeds of production from the well have been held back and distribution awaits the outcome of this litigation.

Two questions are presented. First, were the interests of the parties subject to "pooling"? Second, may the pooling order be made effective retroactively to the date production commenced?

A determination of these questions will require a determination of the purpose and intent of the Oil and Gas Conservation Act found in Chapter 57, article 9, R. R. S. 1943. The act was adopted in 1959. See Laws

1959, c. 262, p. 899. Discussions of the act on the floor of the Legislature are not available, but a transcript of the proceedings before the Committee on Public Works reveals statements made by E. C. Reed, State Geologist, and Ken Monroe, representative of the oil industry. Both supported the act. When asked for a definition of correlative rights, they answered as follows: "Mr. Reed: It is about the only thing that is going to give the landowner any degree of protection. It is open to different interpretations. It has to do with the protection of each man's rights as opposed to another's rights in a fair consideration of the rights of everyone. You are not protecting correlative rights if you let one producer take oil out from under the adjoining person's land indiscriminately.

"Mr. Monroe: It all goes back to the early days of the oil industry when the law of capture was the way you operated an oil field. It was soon learned that this was infringing on the rights of others who had a mutual interest in this field. Correlative rights means 'mutual interest.'"

It is clear that the Legislature understood the protection of "correlative rights," as provided in the act, meant a restriction of the old common law rule of "capture." To ascertain to what extent this was done requires a detailed consideration of the language contained in the act. It must also be borne in mind that under the law of capture, there were no restraints on the drilling of wells. He who drilled was entitled to the oil produced. To protect himself, a neighbor under whose land the pool extended had to, and could, drill his own well.

Referring now to the various sections of Chapter 57, article 9, R. R. S. 1943, we find certain pertinent provisions. Section 57-901, R. R. S. 1943, provides: "It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to au-

thorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; *and that the correlative rights of all owners be fully protected;* * * *.

"It is the intent and purpose of sections 57-901 to 57-921 to permit each and every oil and gas pool in Nebraska to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined *and subject further to the enforcement and protection of the correlative rights of the owners of a common source of oil or gas so that each common owner may obtain his just and equitable share of production therefrom.*" (Emphasis supplied.)

Section 57-902, R. R. S. 1943, prohibits waste and section 57-903, R. R. S. 1943, defines one form of waste as follows: "* * * waste shall also mean the abuse of the correlative rights of any owner in a pool due to nonuniform, disproportionate, unratable *or excessive withdrawals of oil or gas therefrom causing reasonably avoidable drainage between tracts of land or resulting in one or more owners in such pool producing more than his just and equitable share of the oil or gas from such pool;* * * *." (Emphasis supplied.) This section also defines correlative rights as follows: "Correlative rights shall mean the opportunity afforded to the owner of each property in a pool to produce, so far as it is reasonably practicable to do so without waste, *his just and equitable share of the oil or gas, or both, in the pool;* * * *." (Emphasis supplied.)

Section 57-905 (4), R. R. S. 1943, confers authority on the Oil and Gas Conservation Commission to prevent waste and to regulate the drilling, producing, and spacing of wells.

Section 57-906, R. R. S. 1943, requires a permit from the commission before a well may be drilled.

Section 57-907, R. R. S. 1943, authorizes the commission to limit the production of oil and gas from each

pool to an amount that can be produced without waste and further provides: "Whenever the commission limits the total amount of oil and gas which may be produced in any pool in this state to an amount less than that amount which the pool could produce if no restriction was imposed, the commission shall allocate or distribute the allowable production among the several wells or producing properties in the pool on a reasonable basis, preventing or minimizing reasonably avoidable drainage from each developed area not equalized by counter-drainage, *so that each property will have the opportunity to produce or to receive its just and equitable share,* subject to the reasonable necessities for the prevention of waste." (Emphasis supplied.)

Section 57-908, R. R. S. 1943, provides: "(1) When required to prevent waste, to avoid the drilling of unnecessary wells, *or to protect correlative rights,* the commission shall establish spacing units for a pool, * * *. (2) The size and the shape of spacing units are to be such as will result in the efficient and economical development of the pool as a whole, and that size shall be the area that can be efficiently and economically drained by one well. (3) * * * the commission *shall include in the order suitable provisions to prevent the production from the spacing unit of more than its just and equitable share of the oil* and gas in the pool." (Emphasis supplied.)

Section 57-909, R. R. S. 1943, provides: "(1) When two or more separately-owned tracts are embraced within a spacing unit, * * * the commission * * * shall be empowered to enter an order pooling all interests in the spacing unit * * *. Each such pooling order * * * shall be upon terms * * * *that are just and reasonable,* and that afford to the owner of each tract or interest in the spacing unit the *opportunity to recover or receive,* * * *, his just and equitable share.* Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order shall be deemed, *for all purposes, the conduct of such operations upon each sepa-*

rately-owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to each tract * * * shall, when produced, be *deemed for all purposes to have been produced from such tract by a well drilled thereon.*" (Emphasis supplied.) This section also provides sharing of the expense of drilling and producing.

In conformity with the authority conferred on it by section 57-911, R. R. S. 1943, the commission adopted Rule 313, subsection (b) of which is as follows: "All wells drilled to sources of supply at estimated depths in excess of two thousand five hundred (2500) feet for which no spacing pattern has been established by existing wells shall be drilled *on 40-acre legal subdivisions or equivalent lots* and not less than five hundred (500) feet from the boundaries of said legal subdivisions." (Emphasis supplied.)

The pooling order requiring a pooling of the interests of appellants and appellees was entered in conformity with the requirements of the act and under the authority expressly conferred in sections 57-908 and 57-909, R. R. S. 1943, and allocated production as therein directed. We conclude that the pooling order was valid and enforceable.

The primary question is the second mentioned. Can the order allocating production be made retroactive to the date production commenced? Under the common law rule of capture, appellees would have been entitled to all oil produced and appellants only remedy would have been to drill its own well. With the adoption of the Oil and Gas Conservation Act, a landowner could no longer so protect his interest. It became necessary to get a drilling permit and the act contemplates that there shall be only one well if that one can adequately pump out the oil in the pool. Here the appellants are entirely dependent for protection on the pooling order allocating to them a share in the production and the costs of production of appellees' well. The several sections of the

act consistently stress the protection of correlative rights. They are clearly designed to protect adjoining landowners under whose lands a pool may extend. To do so in a fair, reasonable, and adequate manner, and to permit an adjoining owner to obtain, recover, and receive his just and equitable share, the pooling order may be made retroactive to the time production started and, insofar as costs are concerned, to the start of drilling operations. Unless the order may be made effective retroactively, it may on occasion verge on the confiscatory.

We do not mean to say that this should be done in every instance. All pertinent factors affecting the particular case under review must be considered. There is ordinarily no good reason why an adjoining owner should not ask for a voluntary pooling agreement at the time his neighbor starts to drill and thereby share in the expense, as well as in production, whether or not the well proves successful. The statutes clearly intend that rights shall be resolved upon an equitable basis. To permit an adjoining owner to sit back and await the successful outcome of drilling operations without asking for a pooling agreement would place the entire risk and the entire expense upon the party drilling in the event of an unsuccessful operation. This would ordinarily be inequitable and not justify a retroactive order. Section 57-909, R. R. S. 1943, contemplates that when an adjoining owner fails to enter into a voluntary pooling agreement, a spacing and pooling order may be entered on the application of any interested party. The drilling party may recover the share of the expense allocated to the adjoining owner by deducting it from the adjoining owner's share of the oil or gas produced. This enhances the risk taken by the drilling party who may encounter a dry well and is a factor which must also be considered in weighing equities. In this case, due to the early notice of a claim to pooling rights given appellees by appellants, and to the obvious delaying tactics pursued by

appellees, although proceedings before the commission were not commenced as early as they might have been, we are inclined to believe that limiting the pooling order to the date of commencement of such proceedings is not justified and that the order should be made retroactive at least to the date notice of appellants' claim was given. This occurred very soon after completion of the well and in view of the fact that the commission's order allocated drilling, as well as production expense, to appellants, we find the order to be fair and equitable. We direct that such order be reinstated and adhered to. The judgment of the district court is reversed and the cause remanded with directions to enter judgment as herein directed.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I believe the majority opinion is seriously erroneous in several important particulars, some of which I will enumerate forthwith. (1) It misreads, misinterprets, and misapplies the "pooling" provision of the Oil and Gas Conservation Act and disregards and seems to make inapplicable the statutory requirement of establishment of "spacing units" as a precondition for pooling. (2) It ignores and permits the commission to ignore that body's own rules with reference to the establishment of "spacing units." (3) It apparently replaces the spacing unit determination called for by the statute with a privately given "notice of claim." (4) It takes from the owner proceeds of oil lawfully produced from the owner's well and gives it to another under the guise of "pooling" all contrary to well-established and fundamental principles of oil and gas property law. 58 C. J. S., Mines and Minerals, §§ 134 a, (2), b, pp. 213, 215, 218. (5) It violates fundamental principles of property law pertaining to ownership of oil and gas heretofore announced by this court and which have become rules of property law. (6) It creates confusion by using the term "pool" which is defined in the statute, when it

should be referring to "spacing unit." A pool is the reservoir. § 57-903(6), R. R. S. 1943. A spacing unit is that portion of the pool (established by act of the commission after hearing) which can be drained by one well and the production of which is to be shared where there exists separate ownership of tracts within the spacing unit. (7) It interprets the oil and gas act—or I presume the rule requiring the permit to drill—as preventing an owner of oil and gas from protecting his interests by drilling a well to prevent drainage. This is nonsense. See commission Rules 303 and 313(d). Permits are granted administratively and routinely, and where required unorthodox location hearings are one of the most common types of hearing. The commission cannot arbitrarily deny a permit despite the apparent implication in the majority opinion. (8) It cites no authority for its interpretation of the act and ignores respectable and weighty authority from other jurisdictions. (9) It ignores some of the issues raised by the parties.

The effect of the opinion will be to create confusion in the oil and gas industry insofar as the industry is involved with the sections of the statutes discussed in the opinion. I believe that the best way to attempt to lessen the confusion and point out errors in the majority opinion is to write an opinion as I believe it should be. This I now do.

This case arises out of an application of the appellants, Farmers Irrigation District et al., to the Nebraska Oil and Gas Conservation Commission for entry of a compulsory pooling order as to oil production from Government Lot 3, Section 18, Township 22 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska, located in what is known as the North Minatare Field. The application was filed January 16, 1967, and asks that the pooling order be made retroactive to October 15, 1964, the date of commencement of production from a well, known as the White Feather Petroleum Company, Inc., Emery No. 2, drilled on Government Lot 3. The com-

mission entered a pooling order; determined the allocation between the two separate leases which cover separate portions of Government Lot 3; made the allocation effective as to all production subsequent to October 15, 1964; and charged the working interest owners in the two leases with their allocated shares of all drilling completion, storage, supervision, transportation, and other costs necessary to the well. The appellees appealed to the district court for Scotts Bluff County, which court after trial reversed the order of the commission and determined that the Farmers Irrigation District and its lessee, Sun Oil Company, did not prove the facts and allegations contained in their application to the commission and that any minerals owned by the Farmers Irrigation District and its lessee "cannot be pooled." I would reverse the judgment of the district court and remand the cause with directions to the district court to remand to the commission for further proceedings not inconsistent with this dissenting opinion.

The Farmers Irrigation District is the owner of a strip of land 150 feet wide extending across the south part of Government Lot 3. This strip appears to contain approximately 4.19 acres. Sun Oil Company holds an oil and gas lease covering this tract. No well was drilled thereon. The appellees, other than White Feather Petroleum Company, Inc., are the owners of the balance of Government Lot 3, containing about 43.92 acres. White Feather is the holder of the oil and gas lease on that tract. White Feather drilled a producing well in the approximate center of Government Lot 3 which became productive about October 15, 1964. On about December 22, 1964, Sun gave notice to White Feather and others of its lease and claimed a proportionate share of the production from the Emery No. 2 well. Proceeds from production were apparently thereafter held in suspense and distribution awaited ultimate outcome of this and other litigation.

Farmers and Sun base their claim of right to a retro-

active pooling order upon application of subsection (b) of Rule 313 of the commission. Rule 313 is entitled "LOCATION OF WELLS." Subsection (b) reads as follows: "All wells drilled to sources of supply at estimated depths in excess of two thousand five hundred (2500) feet for which no spacing pattern has been established by existing wells shall be drilled *on 40-acre legal subdivisions or equivalent lots* and not less than five hundred (500) feet from the boundaries of said legal subdivisions." (Emphasis supplied.)

The appellants contend that this rule establishes a spacing unit or drilling unit for the purposes of sections 57-908 and 57-909, R. R. S. 1943. The appellees contend that since the rules of the commission were not introduced into evidence in the trial court neither that nor this court can take notice of the commission rules. I would reject both contentions. Some of the appellees also take the position that Rule 313(b) does not have the effect of establishing a spacing unit for a pool or a portion thereof. As already indicated, I think this is correct.

For the reasons I set forth hereafter, I would hold that the trial court and this court can and should take judicial notice of the general rules of the commission provided they are properly adopted and promulgated. Section 57-911(5), R. R. S. 1943, is in part as follows: "All rules, regulations and orders issued by the commission shall be in writing, shall be entered in full and indexed in books to be kept by the commission for that purpose, and shall be public records open for inspection at all times during reasonable office hours and shall be filed as provided by Chapter 84, article 9." Section 84-906, R. R. S. 1943, provides in part as follows: "No rule required under this act to be filed with the Secretary of State shall be valid as against any person until the certified copy of the rule shall have been so filed; and, unless otherwise specifically provided by law, such filing of any rule shall, except where notice by publica-

tion is insufficient in law, *be sufficient to give notice of the contents of such rule to any person subject thereto or affected thereby.*" (Emphasis supplied.)

"In ascertaining matters of fact or of law to be judicially noticed, the judge may resort to, or obtain information from, any source of knowledge which he feels would be helpful." 31 C. J. S., Evidence, § 12, p. 833. My investigation discloses that the rules were adopted and filed in conformity with the statutes. The original rules of which Rule 313(b) is a part were filed and approved in accordance with Chapter 84, article 9, R. R. S. 1943, on January 12, 1960. This court has long taken judicial notice of properly promulgated regulations of federal administrative agencies. Larson v. First National Bank, 66 Neb. 595, 92 N. W. 729; Powell v. Anderson, 147 Neb. 872, 25 N. W. 2d 401; 31 C. J. S., Evidence, § 39, p. 978. No different rule should apply to the regulations of our own state administrative agencies. The statute cited would appear to make it mandatory. "State courts may take judicial notice of the rules and regulations of the various departments of the state government." 31 C. J. S., Evidence, § 39, p. 980. The general rules of the commission properly adopted and filed in accordance with the foregoing statutes are legislative facts of which judicial notice may be taken. State v. Freeman (Okla.), 440 P. 2d 744; H. F. Wilcox Oil & Gas Co. v. State, 162 Okla. 89, 19 P. 2d 347, 86 A. L. R. 421.

I now examine the contention of the appellants that the adoption of Rule 313(b) had the effect of establishing a spacing unit by virtue of which the appellants were, under the compulsory pooling order of the commission entered on June 22, 1967, entitled to share in the production from the Emery No. 2 well as of the date of first production. This question requires an examination of the Oil and Gas Conservation Act. One of the underlying purposes of the act is "enforcement and protection of the correlative rights of the owners of a common source of oil or gas so that each common

owner may obtain his just and equitable share of production therefrom." § 57-901, R. R. S. 1943. The act also prohibits waste which includes the abuse of the correlative rights of any owner. §§ 57-903, 57-908, R. R. S. 1943. Section 57-905(4)(c), R. R. S. 1943, grants authority to the commission to regulate "the spacing of wells." Section 57-905(7), R. R. S. 1943, gives the commission the authority to promulgate and enforce rules and regulations to effectuate the purposes of the act.

Sections 57-908 and 57-909, R. R. S. 1943, are the sections which pertain to the establishment of "spacing units" and the "pooling of interests." The first-mentioned section provides that to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights the commission shall establish spacing units for a pool, which units are to be of substantially uniform size and shape for the entire pool. The size and shape may vary in different zones of the pool as established by the commission. A spacing order must specify the size and shape of each unit and the location of the well. Rule 338 of the commission is as follows: "The Commission may upon its own motion or upon the motion of any interested party *and after notice and hearing* establish spacing units of a specified and approximate uniform size and shape for each pool within this State." (Emphasis supplied.)

Section 57-909, R. R. S. 1943, provides that when two or more separately owned tracts are embraced within a spacing unit, their owners may voluntarily pool their interests and, in the absence of voluntary pooling, authorizes the commission upon application or on its own motion to enter an order for the pooling of interests in the unit. This section states in part: "Each such pooling order shall be made only after notice and hearing, and shall be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to

recover *or receive,* without unnecessary expense, his just and equitable share. . . . Each such pooling order shall make provision for the drilling and operation of *the authorized well* on the spacing unit, and for the payment of the reasonable actual cost thereof, including a reasonable charge for supervision. As to each owner who refuses to agree upon the terms for drilling and operating the well, the order shall provide for reimbursement for his share of the costs out of, and only out of, production from the unit representing his interest, excluding royalty or other interest not obligated to pay any part of the cost thereof." (Emphasis supplied.) It is not necessary for the purposes of this opinion to refer to other provisions of this section.

The above statutes make it clear that Rule 313(b) does not and could not establish "spacing units" for the various producing pools in the state. It appears to be merely a well location rule under section 57-905(4)(c), R. R. S. 1943. Section 57-908, R. R. S. 1943, obviously contemplates an order establishing spacing units for "a pool," not one general order establishing uniform units for all pools in the state known and unknown. Rule 338 of the commission, which I have previously quoted, recognizes this obvious statutory intention. An administrative agency is bound by its own rules. 73 C. J. S., Public Administrative Bodies and Procedure, § 107, p. 428.

In Carter Oil Co. v. State, 205 Okla. 541, 240 P. 2d 787, the Supreme Court of Oklahoma had before it a rule similar to Rule 313(b). It there held that such a rule did not establish a "spacing unit," but merely established the location of a drilling site, and said: "Unit lines must be established by a proper procedure." The pertinent portions of the Oklahoma statutes are sufficiently similar to our own to make the above case valuable as a precedent.

There is, however, another reason why I could not interpret Rule 313(b) as contended for by the appel-

lants and still uphold its validity. The commission has been granted by the Legislature both legislative and quasi-judicial or adjudicatory powers. In adopting rules it acts legislatively. It need give public notice only to the extent the statute requires it. 1 Am. Jur. 2d, Administrative Law, § 162, p. 965; 2 Am. Jur. 2d, Administrative Law, § 277 et seq., p. 107; 2 Am. Jur. 2d, Administrative Law, § 588, p. 418. In deciding issues involving parties, as in the case of establishing spacing units or making compulsory pooling orders, it acts in an adjudicatory manner and due process requires notice to the interested parties and an opportunity to be heard. Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508. The interpretation of administrative regulations is a function of the courts. 2 Am. Jur. 2d, Administrative Law, § 656, p. 517.

The next question to be answered is does the commission, where no spacing unit has previously been established, have authority under section 57-909, R. R. S. 1943, to enter a pooling order which is effective retroactively to a date prior to the filing of the application? The statutes themselves grant no such power. The commission is a creature of statute and its power and authority is limited by the statutory provisions creating it. Continental Oil Co. v. Oil Conservation Comm., 70 N. M. 310, 373 P. 2d 809; Carter Oil Co. v. State, *supra;* Railroad Commission of Texas v. Rowan Oil Co., 152 Tex. 439, 259 S. W. 2d 173; Union Pacific R. Co. v. Oil & Gas Conservation Comm., 131 Colo. 528, 284 P. 2d 242.

In determining the question we must take cognizance of the vested rights of the owners in the production from the Emery No. 2 well. "Under the law of capture, an owner of land acquires title to oil or gas which he produces from wells on his land although part of the oil or gas may have migrated from adjoining wells. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands and without incurring liability to him

for drainage." Baumgartner v. Gulf Oil Corp., 184 Neb. 384, 168 N. W. 2d 510. In Wood Oil Co. v. Corporation Comm., 205 Okla. 537, 239 P. 2d 1023, the Supreme Court of Oklahoma held, under a statute similar to ours, that the right of an owner to drill wells and take from pools below the oil and gas that he may be able to reduce to possession, including that which may migrate from the land of others, is subject to the reasonable exercise of the power of the state to prevent waste and secure equitable apportionment of landowners of the migratory oil and gas underlying the land. It further held that the lessee had title absolute to the oil produced by it prior to the pooling. This is consistent with the prior pronouncement of this court in Baumgartner v. Gulf Oil Corp., *supra.*

The question here involved was before the Supreme Court of Oklahoma in Wood Oil Co. v. Corporation Comm., *supra.* The court there held that the commission had no authority to enter a pooling order effective prior to the establishment of the spacing unit. There is some confusion in the language of the opinion because the court seems to refer to establishment of the spacing unit and entry of the pooling order interchangeably. Statutes which authorize compulsory pooling of interests in a spacing unit are not self-executing. A person seeking to avail himself of the benefits must apply to the appropriate board or commission. Gruger v. Phillips Petroleum Co., 192 Okla. 259, 135 P. 2d 485. Appellants in this case took no steps to avail themselves of the compulsory pooling provision for almost 2 years.

A reading of our statutes leads me to believe that the date of application or motion for the establishment of the spacing unit is the time beyond which the pooling may not be retroactive. No doubt the commission can on proper application and notice establish spacing units and pooling in the same proceeding. This leads to a consideration of the order of the commission in this case. It does not specifically purport to create a

spacing unit consisting of Government Lot 3. This, however, is the obvious intent of the order and any technical deficiencies in the journalization thereof could be corrected on the remand of this case. Since there was no lawfully established spacing unit prior to January 16, 1967, the commission erred in making its pooling order retroactive to October 15, 1964.

The judgment of the trial court in this case does not give specific reasons for its decision. Accordingly I would examine the evidence in support of the application to determine its sufficiency. I have carefully reviewed the expert testimony presented to the trial court in support of the appellants' claim that the oil underlying their portion of Government Lot 3 was draining to and being produced by the Emery No. 2 well. This testimony was not contradicted. It clearly supports the conclusion that sands underlying the appellants' tract were productive of oil. Apparently substantially the same evidence was introduced before the commission except for a change in the calculated percentages estimated to be underlying the two tracts. The commission allocated production based upon the relative percentage of recoverable oil originally in place under each tract. The evidence shows that the Emery No. 2 well is located high on the structure, and that the water drive is from the south and west pushing the oil onto and across the appellants' tract and then onto that of the appellees to be produced from the well. Under these circumstances we could not say as a matter of law that an allocation of the production of the well based upon the relative percentages of the recoverable oil originally in place underlying each of the tracts is erroneous.

I would remand the cause to the district court with directions to remand to the commission. The commission should determine the just and equitable share of the owners in the production of the White Feather Petroleum Company, Inc., Emery No. 2 well from and after

January 16, 1967, and the just and equitable charges to Sun Oil Company for drilling, completion, operation, storage, supervision, transportation, and other costs. I now take note of a problem which would arise on the remand to the commission. Section 57-909(2), R. R. S. 1943, provides that the order for reimbursement to the drilling working interest owner by the nondrilling working interest owner for costs shall be "out of, and only out of, production." The statute refers to "reasonable actual cost" but seems to contemplate only the situation where the spacing unit is established and the pooling order entered before the well is drilled. Where, as here, there is compulsory pooling with reference to an existing producing well, the matter is more complex. It would seem clear enough that Sun Oil Company should not be charged with a share of production costs attributable to the period in which it does not share in the production. As to drilling and completion costs, the problem would arise in connection with the valuation of the well investment. How should such costs be determined? Section 975, 5 Summers Oil and Gas (Perm. Ed.), p. 126, treats of this question and without citation of authority makes suggestions as to how the well investment should be valued. Since the question is not now before the court, I would not undertake to lay down a rule, but would call attention to the fact that the statute does not completely cover the matter. The commission, of course, could if necessary receive additional evidence necessary to make the above determination.

One other matter should be noted. The same parties were before this court in Sun Oil Co. v. Emery, 183 Neb. 793, 164 N. W. 2d 644. There this court determined that Farmers acquired fee title to its strip of land by its deed as against the contention that it held only an easement. As shown by the transcript here the district court, following that decision of this court, quieted the title of Farmers and its then lessee. The application to the Oil and Gas Conservation Commission involved here

was apparently filed prior to the commencement of the action involved in Sun Oil Co. v. Emery, *supra*. In their answer in the district court the appellees denied appellants' title. Appellants complain that the order of the district court in this case which contained a general finding for the appellees is contrary to the decision in the quiet title action previously mentioned because of the general finding in favor of the appellees. The appellees in their brief concede the ownership of Farmers and Sun in the minerals underlying the 4.19-acre tract. If the decree in the instant case is in conflict with the quiet title judgment it appears simply to have been an oversight in the journalization of the judgment. This matter could be corrected and clarified by the district court on the remand.

SMITH and MCCOWN, JJ., join in this dissent.

HARRIETTE MANDELBERG, APPELLEE AND CROSS-APPELLANT, V. LOUIS MANDELBERG, APPELLANT AND CROSS-APPELLEE.
195 N. W. 2d 148

Filed February 18, 1972. No. 38001.

1. **Divorce: Actions.** Nebraska has recognized the divisibility of divorce actions since 1894 where a foreign divorce is involved.
2. **Divorce: Actions: Jurisdiction: Property.** This action for alimony and a division of property was not barred by the Colorado divorce decree rendered on constructive service, and the district court for Box Butte County, Nebraska, had jurisdiction to entertain it.
3. **Divorce: Actions: Property.** In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that

time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Reddish, Fiebig & Curtiss, for appellant.

Atkins, Ferguson, Nichols & Hahn and Dennis M. Coll, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

This action by Harriette Mandelberg against Louis Mandelberg seeks a division of property, attorneys' fees, and costs. The basic issue presented is: Can a wife obtain a foreign divorce in which there is no appearance by the husband and in which alimony is reserved, and thereafter return to Nebraska and obtain alimony or a division of property? The trial court allowed plaintiff one-third the value of the property, payable in 10 annual installments, but refused to allow attorneys' fees. The incidental questions presented are the fairness of the division, if division is permissible, and whether or not attorneys' fees are allowable. We affirm.

The parties, who first met while attending the University of Colorado, were married in Denver, Colorado, November 17, 1949. Plaintiff, who had been a Denver resident, returned with the defendant to Alliance, Nebraska, where defendant entered the family business. The business is principally an automotive parts corporation but also involves certain machine operations on internal combustion engines in which there is little or no competition. There is also substantial real estate rental income.

The marriage of the parties was a stormy one. In 1957, they adopted Lawrence A. Mandelberg, who was born March 26, 1957. In the fall of 1965, plaintiff returned to Denver, taking the child with her, and on March 7, 1966, she filed a petition for divorce in the district court for Box Butte County, Nebraska. In June the parties reconciled and plaintiff returned to Alliance. They remained together until August 1967, at which time the plaintiff again took the child and returned to Denver. In June 1968, she filed for divorce in the district court for Arapahoe County, Colorado. Defendant did not make an appearance in the Colorado proceeding, and a decree of divorce, specifically reserving the matter of the division of property and allowances, was entered. The defendant was aware of the proceedings for the divorce, paid the attorneys' fees of $1,000 for it, and on November 14, 1969, married his present wife. He is estopped to question the validity of the divorce proceedings. The plaintiff, who has not remarried, brought this action December 20, 1968. Lawrence A. Mandelberg has been living with his father since December 27, 1969, and the question of custody is not involved herein.

It will serve no useful purpose to detail the problems of the parties during the marriage. The trial judge found that the plaintiff failed to prove the defendant at fault. We believe that the record will support a finding of extreme cruelty on the part of the defendant, but in the context of this case do not disturb the trial court's finding. It is undisputed that plaintiff has had severe emotional problems and has needed psychiatric help during the course of the marriage. She was hospitalized for a period of time in 1964 in the Hastings State Hospital; received counseling at Methesda Hospital in Denver; and was residing at the hospital during the time of the trial herein.

The main question presented is the jurisdiction of the district court for Box Butte County to maintain this action. The Colorado court had no personal jurisdiction

of the defendant and consequently was powerless to enter a personal judgment against him. No jurisdiction existed to award alimony and that issue was specifically reserved by the Colorado court.

The authorities are divided as to the divisibility of divorce actions, that is, one action as to the marital status of the parties and the other the right to alimony or division of the property. If it were an open question in Nebraska, we probably would consider divisibility, at least where constructive service is involved, to be the preferable rule. However, the question is not an open one. This court early recognized the divisibility of divorce actions. In Cochran v. Cochran (1894), 42 Neb. 612, 60 N. W. 942, it was held that district courts, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute and permitted a divorced wife to maintain an action for alimony. Doubt was subsequently cast on this holding in Eldred v. Eldred (1901), 62 Neb. 613, 87 N. W. 340. This doubt, however, was resolved in Bodie v. Bates (1914), 95 Neb. 757, 146 N. W. 1002, where the court, after analyzing the two cases, said: "We think our holding in Cochran v. Cochran is sound and should be followed; and, in so far as it conflicts therewith, Eldred v. Eldred is overruled."

Bodie is a much stronger case than the instant one, for there the defendant was personally served. The Arkansas court held it did not have jurisdiction to take cognizance of the real estate in Nebraska without the consent of the parties to consider the same in fixing alimony. Bodie involved the division of the Nebraska property. In the instant case the Colorado court had no personal jurisdiction of the defendant, the right to alimony could not be adjudicated in that action. It did, however, specifically reserve the question for future determination. The present action for alimony and a division of property was not barred by the Colorado

divorce decree, and the district court for Box Butte County had jurisdiction to entertain it.

The rule for determining the division of property in a divorce is as follows: " 'In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.' " Diers v. Diers, 185 Neb. 552, 177 N. W. 2d 503.

In determining the value of the corporate stock the trial judge used the values shown in the corporate balance sheet as of December 31, 1968, except for the real estate. With respect to the real estate, he used the actual tax value for 1969, or the defendant's opinion of the value where he deemed it appropriate. While ordinarily value for tax purposes has little probative value, in two instances herein it was corroborated to some extent by rentals. It was only used by the trial judge where he considered the defendant's opinion as not credible. We have reviewed the trial court's computations and believe them to be fair and equitable under the circumstances. In view of the plaintiff's apparent mental instability, the setting off of one-third of the property to the plaintiff is reasonable under the circumstances.

With reference to the allowance of attorneys' fees, we

do not believe them to be proper under the circumstances of this case, particularly where the defendant did pay attorneys' fees for the securing of the Colorado divorce.

We affirm the judgment of the trial court.

AFFIRMED.

KENNETH B. SHEAR, APPELLANT, V. COUNTY BOARD OF COMMISSIONERS, ROCK COUNTY, NEBRASKA, APPELLEE.
195 N. W. 2d 151

Filed February 18, 1972. No. 38027.

1. **Courts: Jurisdiction: Quo Warranto: Mandamus: Injunction: Public Officers and Employees.** The district court has jurisdiction to determine a plaintiff's right to assume and hold the office of county assessor under plaintiff's petition for a writ of mandamus praying for appropriate injunctive relief.
2. **Actions: Quo Warranto: Public Officers and Employees.** In an action to establish the plaintiff's alleged right to assume the office of county assessor, he has the burden of proving every essential element to establish his legal right to assume the office.
3. **Courts: Legislature: Statutes: Administrative Law: Constitutional Law.** In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution.
4. **Legislature: Public Officers and Employees: Counties.** The Legislature has complete power and authority to prescribe the qualifications for the office of county assessor, limited only by the requirement that such conditions of eligibility shall not be unreasonable.
5. **Legislature: Statutes.** It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

Appeal from the district court for Rock County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert T. Finn, for appellant.

Clarence A. H. Meyer, Attorney General, Ralph H. Gillan, and W. Harold Allen, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action in mandamus by the plaintiff Kenneth B. Shear to require the County Board of Commissioners of Rock County, Nebraska, to install him in the office of county assessor. After hearing, the district court found the office of county assessor to be vacant and denied the issuance of a restraining order or a permanent writ of mandamus. The plaintiff has appealed.

The plaintiff, Kenneth B. Shear, was elected to a 4-year term as county assessor of Rock County, Nebraska, at the election on November 3, 1970. A certificate of election was issued to him on November 6, 1970. No action to contest the election was filed. On January 5, 1971, the plaintiff presented a bond and oath of office which the defendant board refused to accept. The plaintiff did not hold a county assessor certificate from the state Tax Commissioner as required by section 77-423, R. S. Supp., 1969. The board indicated to the plaintiff that the office of county assessor would be declared vacant and someone else would be appointed to fill the vacancy. This action was then commenced by the plaintiff.

The plaintiff raises two primary issues. He contends that the court had no jurisdiction to try his right to assume the office of assessor in this proceeding because an election contest or a quo warranto proceeding are exclusive remedies for testing the right to hold elective office. He also contends that the provisions of sections 77-415 to 77-428, R. R. S. 1943, and R. S. Supp., 1969, and in particular section 77-423, R. S. Supp., 1969, are unconstitutional.

Sections 77-421 and 77-422, R. S. Supp., 1969, require

the Tax Commissioner to hold examinations for certification as county assessor and to issue a county assessor's certificate to the successful applicants.

Section 77-423, R. S. Supp., 1969, provides: "No person shall on or after January 1, 1970, assume the office of assessor or deputy assessor in any county of this state unless he shall hold a county assessor certificate."

It is apparently the plaintiff's position that unless an election contest is filed within the statutory time, the successful candidate at the election for county assessor must be permitted to assume office whether he meets statutory qualifications or not, and thereafter a quo warranto action is the exclusive remedy to remove him. Quo warranto is, of course, a proper remedy to test the right to hold office. Cases relied on by the plaintiff such as State ex rel. Barton v. Frantz, 55 Neb. 167, 75 N. W. 546, and School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561, did not contemplate a statute such as section 77-423, R. S. Supp., 1969.

The plaintiff's argument is that the district court has no jurisdiction to determine the issues raised in this case except in a form of action entitled "quo warranto." Determining the correct title and form of a proceeding under common law pleadings is no longer the critical legal issue it was in the Nineteenth Century. The district court had jurisdiction to determine the plaintiff's right to assume and hold the office of county assessor. That jurisdiction could be and was properly invoked by the plaintiff by a petition for a writ of mandamus which prayed for appropriate injunctive relief. In an action to establish the plaintiff's alleged right to assume the office of county assessor, he has the burden of proving every essential element to establish his legal right to assume the office

The plaintiff's second major contention is that sections 77-421, 77-422, and 77-423, R. S. Supp., 1969, are unconstitutional. The attack rests on the assertion that there is an unconstitutional delegation of legislative

power to the state Tax Commissioner, and that the statutes create an unreasonable classification. The first two challenged statutes require the Tax Commissioner to hold examinations of applicants for certification as county assessors and to issue certificates of successful completion. Section 77-423, R. S. Supp., 1969, then forbids any person to assume the office of assessor or deputy assessor in any county of this state unless he shall hold such a county assessor's certificate. A portion of section 77-421, R. S. Supp., 1969, provides: "Examination shall be written, or both written and oral, shall be of such character as fairly to test and determine the qualifications, fitness and ability of the person tested actually to perform the duties of county assessor. The Nebraska County Assessors Association shall assist the Tax Commissioner in preparing such examination."

The Nebraska Constitution provides that the Tax Commissioner shall have jurisdiction over the administration of the revenue laws of the state, and with other state officers, shall have power to review and equalize taxation of property within the state. He shall have such other powers and perform such other duties as the Legislature may provide. See, Constitution of Nebraska, Article IV, section 28. This is clearly a constitutional grant of power dependent only upon implementing leglative action. In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458. Even if the statute here were construed as a delegation of authority to an administrative agency to formulate rules and regulations to carry out an expressed legislative purpose or to implement such a pur-

pose, the standards set forth are sufficiently definite to be within the designated limitations of the expressed legislative intent.

The Legislature has complete power and authority to prescribe the qualifications for the office of county assessor, limited only by the requirement that such conditions of eligibility shall not be unreasonable. See State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N. W. 2d 892. It is clearly reasonable to require testing as to the fitness and ability of a person to perform the duties of the particular public office to which he seeks election or appointment. Fortunately or unfortunately, the statutory requirement of tests for certification of qualifications for the office of county assessor does not extend to other elective offices. That fact does not create an unconstitutional discrimination against prospective candidates for the office of county assessor. There is no constitutional requirement that the statutory qualification requirements must be identical for all elective offices of county government.

The legislation here was general legislation and not local or special legislation. It is clearly competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. See Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES WILLIAM ALCORN, APPELLANT.

194 N. W. 2d 798

Filed February 18, 1972. No. 38077.

1. **Criminal Law: Evidence: Verdicts: Juries.** Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Receiving Stolen Goods: Intent.** In a prosecution for receiving stolen property where facts known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know the property to have been stolen, a jury may properly find that defendant possessed guilty knowledge.
3. **Criminal Law: Receiving Stolen Goods: Words and Phrases.** The word "receiving" in the offense of receiving stolen property, essentially means acquisition of control in the sense of physical dominion or apparent legal power to dispose.
4. **Criminal Law: Aider and Abettor.** Conviction of the principal is not necessary for conviction of an aider or abettor.
5. **Criminal Law: Aider and Abettor: Receiving Stolen Goods.** In a prosecution for receiving stolen property, conviction of the defendant does not depend upon conviction of the thief.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Robert V. Burkhard, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A jury found James William Alcorn guilty of the offense of receiving stolen property. On appeal he asserts insufficiency of the evidence of guilty knowledge and receiving.

On April 1 or 2, 1970, someone broke into the warehouse of Aaron Ferrer and Sons Company, a scrap metal dealer in Omaha. Stolen were 8 or 9 rolls of hard-

drawn, stranded copper wire. The manager informed the police and other scrap dealers, of whom the Alter Company in Council Bluffs, Iowa, was one.

On Saturday, April 4, 1970, Alcorn was a passenger in a Chevrolet automobile owned and operated by Chester Holliman. The latter was an employee of a meat packing company and a brother-in-law and close friend of Alcorn. The trunk of the Chevrolet contained 8 to 10 rolls of hard-drawn, stranded copper wire that weighed 800 pounds and had a market value of $400 to $500. Holliman and Alcorn proceeded to the Alter yard where they began unloading the rolls onto Alter's receiving dock. The Alter manager identified the rolls by their color, and he called the police.

The thief had entered the Ferrer warehouse by breaking a hole in an overhead door. The hole, 3½ feet in diameter, was located 2 feet above the bottom of the door. Ferrer had installed the "ADT" burglary alarm which an opening of the door but not the making of a hole, would activate. Near the inside of the door stood a forklift and an empty bucket of the skid type for storage of the rolls. The bucket with a capacity of 10 rolls had been full. One roll lay outside the door.

Hard-drawn, stranded copper wire was used principally in electrical transmission lines and occasionally in telephone lines. A scrap dealer seldom purchased the wire from anyone except such a company or another scrap dealer. The green color of the wire distinguished it from the red color of ordinary copper. There was no other direct physical evidence that the rolls in the Chevrolet were the rolls stolen from Ferrer.

Ferrer employed Alcorn from March 2 to April 5, 1970, to work chiefly in the warehouse. Alcorn had experience operating a forklift. At work on April 3 he heard other employees speaking of the breaking into the warehouse.

Alcorn, previously convicted of a felony, testified as follows. He had not heard anyone at work on April

3 say what the thief had stolen. Holliman ordinarily visited him early each Saturday. On April 4, 1970, he was awakened by Holliman. He subsequently rode with Holliman to the Alter yard without noticing that something was causing the rear of the car to ride low to the ground. En route he knew nothing of Holliman's destination or purpose. He first learned of the contents of the trunk when Holliman opened it. At the time Alcorn did not think of the Ferrer burglary. He asked Holliman why the latter did not sell the rolls to Ferrer. Holliman replied that Alter paid the better price. Holliman also said he had found the rolls in a South Omaha street.

A jury in a separate trial acquitted Holliman.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970).

In a prosecution for receiving stolen property where facts known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know the property to have been stolen, a jury may properly find that defendant possessed guilty knowledge. State v. McKee, 183 Neb. 754, 164 N. W. 2d 434 (1969).

The word "receiving"' in the offense of receiving stolen property, essentially means acquisition of control in the sense of physical dominion or of apparent legal power to dispose. See A.L.I., Model Penal Code, Tent. Dr. No. 2, § 206.8, Comment 2, p. 94 (1956).

Conviction of the principal is not necessary for conviction of an aider or abettor. See, State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970); Pigman v. United States, 407 F. 2d 237 (8th Cir., 1969). In a prosecution for receiving stolen property, conviction of the defendant does not depend upon conviction of the thief. See Norton v. State, 119 Neb. 588, 230 N. W. 438 (1930).

The evidence of guilty knowledge and receiving on

the part of Alcorn is sufficient to sustain the verdict. Other contentions of Alcorn are not well taken.

The judgment is affirmed.

AFFIRMED.

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103. In order to warrant conviction on circumstantial evidence, circumstances taken together must be of such conclusive nature and tendency as to produce reasonable and moral certainty in minds of jury beyond reasonable doubt that accused committed offense charged. State v. Ortiz 515
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115. Gist of offense of obtaining money by false pretenses is obtaining money of another by false pretenses, with intent to cheat and defraud. State v. Bohannon 594
116. To sustain charge of obtaining money by false pretenses, must be reliance upon representations made, and pretense must be effective cause in inducing owner to part with his property; however, need not be sole moving cause. State v. Bohannon ---------- 594
117. If owner has knowledge of truth, offense of obtaining property by false pretenses not committed. State v. Bohannon ---------- 594
118. Intent to cheat and defraud may be proved by circumstances surrounding transaction. State v. Bohannon ---------- 594
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123. Voluntary statements made by defendant ordinarily admissible, especially when defendant not in custody when statements made. State v. Adams ---------- 662
124. Proper for court to grant charge and sentence concessions to defendants who plead guilty when interest of public in effective administration of criminal justice would be served. State v. Black Bear ------ 670
125. Plea of guilty embodies waiver of every defense to charge, whether procedural, statutory, or constitutional. State v. Mason ---------- 675
126. For post conviction relief on ground of ineffective assistance of counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Mason ---------- 675
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130. Under cited statute, guilty knowledge may be established by circumstantial rather than direct evidence. State v. Oltjenbruns ---------- 694

131. Concealment, within meaning of cited statute, simply means any possession of goods in such manner as to keep them from rightful owner and intent to deprive owner of his property. State v. Oltjenbruns -- 694
132. Function of prosecutor's opening statement to generally state nature of case; within discretion of prosecutor how much or how little to comment specifically upon evidence to be offered. State v. Oltjenbruns ---------- 694
133. Trial court in criminal case has large, though not unlimited, discretion in granting or refusing permission to ask witness leading question; discretion legal one and subject to proper limitations. State v. Hoffmeyer ---------- 701
134. As general rule, evidence of other crimes not admissible to prove guilt of defendant of particular crime charged; are exceptions, however, to rule; such evidence relevant and admissible if tends to prove particular criminal intent which is necessary to constitute crime charged. State v. Hoffmeyer ---------- 701
135. Test of sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Morgan ---------- 706
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153. No denigration of right to trial to hold when defendant waives his state court remedies and admits guilt, he does so under law then existing; further, he assumes risk of ordinary error in either his or his attorney's assessment of law and facts. State v. Bevins ---------- 785

154. Where defendant in criminal action has voluntarily paid fine imposed upon him, he waives right of appeal. State v. Fulton ---------- 787

155. While mere possession of stolen property standing alone insufficient to justify conviction of burglary, such possession of property is circumstance which, taken in connection with other incriminating evidence in case may be considered by jury in determining question of guilt or innocence of defendant so charged. State v. Cook ---------- 788

156. In order for defendant's possession of stolen property to be sufficient to support conviction, such possession must be recent, that is, not too remote in time from crime. State v. Cook ---------- 788

157. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were principal offender. State v. Cook ------ 788

158. Plea of guilty induced by filing habitual criminal charge 3 days before trial not invalid where defendant represented by counsel and circumstances show that plea voluntarily and understandingly entered. State v. Reed ---------- 792

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162. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that evidence insufficient to support finding of guilty beyond reasonable doubt. State v. Tolle 823

163. In prosecution for receiving stolen property where facts known to defendant such that man of age,

intelligence, and experience of defendant would know property to have been stolen, jury may properly find defendant possessed guilty knowledge. State v. Alcorn ---------- 854
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Damages.

1. Exclusion in liability policy excluding from coverage injury to or destruction of any goods sold or work completed by named insured out of which accident arises eliminates any coverage for injury to or destruction of product furnished or work completed by named insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
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3. Measure of damages for breach of contract for specific work at agreed price is difference between stipulated price and cost of completing work. Sinnett v. Dial Constr. Co. ---------- 190
4. Court of equity will not grant injunctive relief unless shown that injury has been or will be suffered by party seeking such relief. Muchemore v. Heflin - 217
5. Injunction will not be granted unless right is clear, damage irreparable, and remedy at law inadequate to prevent failure of justice. Muchemore v. Heflin - 217
6. Where one, knowing and comprehending danger, voluntarily exposes himself to it, although not negligent in so doing, deemed to have assumed risk and precluded from recovery for injury resulting therefrom. Hollamon v. Eagle Raceway, Inc. ---------- 221
7. One who participates in sport of stock car racing assumes ordinary risks of that sport. Hollamon v. Eagle Raceway, Inc. ---------- 221

8. Measure of damages for action for wrongful death of minor child is pecuniary loss which parent sustains by reason of being deprived of child's services during his minority and loss of contributions that might reasonably be expected to be made after reaching his majority. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342
9. Medical or funeral expenses resulting from wrongful death recoverable as damages in action under cited statutes when beneficiaries for whom action brought have paid or legally obligated themselves to pay such expenses and may be recovered in separate cause of action. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342
10. Market value of property includes value for any reasonable use to which it may be put. Johnson v. Nebraska Public Power Dist. ---------- 421
11. Owner may show all reasonable uses to which land adaptable and what lands are worth in view thereof. Johnson v. Nebraska Public Power Dist. ---------- 421
12. Evidence in eminent domain case as to valuation for future uses must be limited to adaptability of land that may be reasonably expected in immediate future. Johnson v. Nebraska Public Power Dist. -- 421
13. Weight and credibility of testimony of both lay and expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. ---------- 421
14. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. - 421
15. When evidence in condemnation proceedings conflicting, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421
16. Person injured by negligence of another and claiming right to recover for future pain and suffering and permanent disability can recover for such elements as evidence shows reasonably certain to be experienced in future. Jindra v. S. M. S. Trucking Co. ---------- 502
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1. Measure of damages for action for wrongful death of minor child is pecuniary loss which parent sustains by reason of being deprived of child's services during his minority and loss of contributions that might reasonably be expected to be made after reaching his majority. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342
2. Medical or funeral expenses resulting from wrongful death recoverable as damages in action under cited statutes when beneficiaries for whom action brought have paid or legally obligated themselves to pay such expenses and may be recovered in separate cause of action. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342
3. Where evidence clear that only person within class for which action may be brought under cited statute guilty of negligence as matter of law, duty of court to direct verdict for defendant. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ------- 606
4. Death of defendant pending review on appeal of criminal conviction abates not only appeal but also all proceedings had in prosecution from its inception. State v. Campbell ---------- 719

Debtor and Creditor.

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2. Nebraska, recognizing humanitarian aspects and purposes of adoption statutes, gives them liberal rather than strict construction. Neil v. Masterson 364
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Divorce.

1. Discretion of lower court with respect to awarding or changing custody and support of minor children subject to review; but determination of court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Hanson v. Hanson ---------- 108
2. Ordinarily, custody of minor children awarded to mother in divorce action not disturbed unless by changed circumstances affirmatively shown that mother unfit person to have custody or that best interests of children require such action. Benton v. Benton - 205
3. Trial court's order in child support case not overturned unless abuse of discretion by trial court found. Benton v. Benton ---------- 205
4. Courts take judicial notice of ordinary costs of living and dental, medical, and other familiar costs of living. Benton v. Benton ---------- 205
5. Father primarily liable for support of his children independent of assets of wife and mother. Benton v. Benton ---------- 205
6. Where divorce decree requiring periodic alimony payments contains no provisions as to remarriage, remarriage of divorced wife establishes prima facie case which requires court to terminate alimony in absence of proof of some extraordinary circumstance justifying its continuation. Ballew v. Ballew ---- 397
7. Under divorce decree providing alimony payments shall terminate upon remarriage of wife, right of divorced wife to receive such payments terminated upon remarriage and not revived by annulment of her remarriage on grounds which rendered remarriage voidable. Ballew v. Ballew ---------- 397
8. Where parent has forfeited right to custody of children and custody awarded to someone other than parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change in custody. State ex rel. Sanders v. Doyle -- 453
9. In determining custody of children of tender years, court will give consideration to fact that children have formed natural attachment for person who has stood in relation of parent. State ex rel. Sanders v. Doyle ---------- 453
10. Although preference of children as to custody not controlling, is factor that will be considered by court. State ex rel. Sanders v. Doyle ---------- 453
11. Judgment of trial court fixing amount of alimony

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13. No decree of divorce and of nullity of marriage shall be made solely on declarations, confessions, or admissions of parties, but court shall, in all cases, require other satisfactory evidence of facts alleged in petition for that purpose. Goree v. Goree ----- 774
14. Nebraska has recognized the divisibility of divorce actions since 1894 where foreign divorce involved. Mandelberg v. Mandelberg ---------- 844
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1. A state may constitutionaly charge nonresident higher tuition rate than that charged resident. Thompson v. Board of Regents of University of Nebraska 252
2. Original durational residency requirement to qualify as resident for tuition purposes constitutional. Thompson v. Board of Regents of University of Nebraska ---------- 252
3. Durational residency requirement for tuition purposes does not constitute penalty upon exercise of constitutional right of interstate travel, and such requirement tested under traditional equal protection standards. Thompson v. Board of Regents of University of Nebraska ---------- 252
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5. Test of whether state statute regulating residency for tuition purposes meets traditional equal protection standards turns on whether reasonable basis for classification exists that is related to legiti-

mate objective of state. Thompson v. Board of Regents of University of Nebraska ---------- 252
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2. Reference to section 28-472.03, R. S. Supp., 1969, in section 28-470, R. S. Supp., 1969, surplusage. State v. Greenburg ---------- 149
3. Conviction under section 28-472.03, R. S. Supp., 1969, will be affirmed where record sufficient to sustain conviction under section 28-470, R. S. Supp., 1969. State v. Smith ---------- 152
4. Fact that defendant narcotics addict and experiencing some symptoms of withdrawal does not invalidate plea of guilty where record otherwise indicates plea voluntary and entered intelligently and understandingly. State v. Stapleton ---------- 628

Due Process.

Not every denial of request by accused for continuance violates due process; denial may honor due process, although failure of evidence or defense without counsel results. Answer must be found in circumstances, particularly in reasons presented at time request denied. State v. Kirby ---------- 380

Eminent Domain.

1. Market value of property includes value for any reasonable use to which it may be put. Johnson v. Ne-

braska Public Power Dist. ---------- 421
2. Owner may show all reasonable uses to which land adaptable and what lands are worth in view thereof. Johnson v. Nebraska Public Power Dist. ---------- 421
3. Evidence in eminent domain case as to valuation for future uses must be limited to adaptability of land that may be reasonably expected in immediate future. Johnson v. Nebraska Public Power Dist. ---- 421
4. Weight and credibility of testimony of both lay and expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. 421
5. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. -- 421
6. When evidence in condemnation proceedings conflicting, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421
7. Constitution of Nebraska does not permit taking of private property for private use. Moritz v. Buglewicz 819

Employer and Employee.

Under Workmen's Compensation Act, recreational or social activities within course of employment when employer derives substantial direct benefit from activity beyond intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. Adler v. Jerryco Motors, Inc. ---------- 757

Entrapment.

1. Where person has no previous intent nor purpose to violate law but does so only because persuaded or induced to commit act by law enforcement agents, he is entitled to defense of unlawful entrapment because law as matter of policy forbids conviction. State v. Smith ---------- 511
2. Where person already has readiness or willingness to violate law, mere fact that officer provides what appears to be favorable opportunity for such violation, or merely seeks to collect evidence of offense, not unlawful entrapment and no defense. State v. Smith ---------- 511

Equity.

1. Where court of equity properly acquired jurisdiction in suit for equitable relief, will make complete adjudication of all matters properly presented and involved in case and ordinarily grant such relief, legal or equitable, as required and thus avoid unnecessary litigation. Sechovec v. Harms ---------- 70
2. In suit where specific performance granted, all damages growing out of defendant's breach of contract litigable in specific performance action; separate subsequent actions to recover different elements of such damages for same breach cannot be maintained. Sechovec v. Harms ---------- 70
3. Where court of equity obtains jurisdiction of cause for any purpose, may retain it for all and proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Freeman v. Rose ---------- 176
4. Court of equity will not grant injunctive relief unless shown that injury has been or will be suffered by party seeking such relief. Muchemore v. Heflin ---- 217
5. Injunction will not be granted unless right is clear, damage irreparable, and remedy at law inadequate to prevent failure of justice. Muchemore v. Heflin 217
6. Generally held that necessity of obtaining approval of railway commission to transfer certificate of public convenience and necessity does not preclude court of equity from decreeing specific performance of agreement to transfer such certificate, subject to approval by commission. Schmer v. Abler ------- 245
7. Where evidence, in action for reformation of written instrument, sharply and irreconcilably conflicting, becomes necessary to apply well-known rule of equity that evidence must be clear, convincing, and satisfactory, and in consequence, deny reformation. State Farm Mut. Auto. Ins. Co. v. Selders -------- 342
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Estates.

1. Parties claiming interest in property of decedent by

reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
2. Liability of estate for inheritance tax may be determined upon petition of executrix filed in administration proceeding. Reller v. McArthur ---------- 313
3. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur -------- 313
4. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
5. Judgment creditor of beneficiary may bring creditor's suit to require distributive share in estate be applied toward payment of judgment. Steven v. Ford ---------- 401
6. Notice that will and codicil being offered for probate sufficient to put party receiving notice upon inquiry to determine what documents being offered for probate. Flint v. Panter ---------- 615

Estoppel.

1. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile ---------- 404
2. Litigant who knowingly and deliberately assumes particular position in judicial proceeding, generally estopped to take position inconsistent therewith to prejudice of adverse party. Brander v. Eagle Raceways, Inc. ---------- 508

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2. Motion to withdraw plea of guilty sustained only if defendant proves withdrawal necessary to correct manifest injustice and defendnat must establish such ground by clear and convincing evidence. State v. Johnson ---------- 26
3. Lowest rates published or charged, for substantially same kind of service, prima facie evidence of reasonable rate for services under investigation. How-

ard McLean Co. v. Chicago, B. & Q. R. R. Co. ------ 30
4. Rule is that new trial not granted on grounds of newly discovered evidence when only effect of evidence to impeach or discredit witness. State v. Goham ---------- 34
5. Workmen's Compensation Act does not require objective symptoms of injury produced at time of accident be observed by others or their existence be proved by independent testimony. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
6. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
7. Upon appellate review of workmen's compensation case in Supreme Court, cause considered de novo only where findings of fact not supported by evidence as disclosed by record. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
8. Whether child neglected within purview of statute question of fact; each case determined from all facts and circumstances of each particular case. State v. Randall ---------- 64
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10. Admission of incompetent evidence not prejudicial where same fact established by testimony of complaining party. State v. Christiansen ---------- 73
11. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Myles ---- 105
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12. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles -- 105
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sumption, bears burden of proof that his employment in fact caused compensable injury. Conn v. ITL, Inc. ---------- 112

15. Workmen's compensation claimant with atherosclerosis which was personal risk and cause of otherwise compensable injury may recover under these circumstances: Employment risk greater than that of ordinary nonemployment life was cause of injury. Conn v. ITL, Inc. ---------- 112

16. Plaintiff taxpayer, appealing under provisions of cited statute, has burden of proving levy complained of in fact excessive and illegal. Werth v. Buffalo County Board of Equalization ---------- 119

17. Testimony by expert witness as to weight of exhibit weighed on laboratory scale admissible without prior evidence as to accuracy of scale. State v. Smith ---- 152

18. General rule as to opinion of lay witness that witness may testify only to facts perceived by his senses and may not give opinion or conclusion. Shamburg v. Folkers ---------- 169

19. Lay witness may testify to relevant opinion based upon facts perceived by him if opinion of kind normally formed by person constantly and correctly and witness cannot accurately, adequately, or with reasonable facility describe fundamental facts upon which opinion based; in substance such process under these circumstances description. Shamburg v. Folkers ---------- 169

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21. Where evidence insufficient to sustain verdict in favor of plaintiff, duty of trial court to dismiss action on motion of defendant. Sinnett v. Dial Constr. Co. 190

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67. Activities of thief ordinarily secretive and not usually carried out in presence of witnesses; when commission of offense carried out in such manner, circumstantial evidence necessarily only evidence available, and where many circumstances pointing to guilt of defendant, question for jury under proper instructions safeguarding rights of defendant. State v. Lowrey ---------- 451

68. Test by which jury shall determine sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Escamilla 457

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1. Right of indigent to counsel does not give unbridled right to be represented by counsel of own choosing. State v. Bratton ---------- 460
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3. When defendant becomes dissatisfied with court-appointed counsel, unless he can show good cause to court for removal of counsel, his only alternative to proceed pro se if competent to do so. State v. Bratton ---------- 460

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1. Child custody statutes of Nebraska liberally construed to accomplish purposes of serving best interests of children involved. State v. Randall ___ 64
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2. Cited statutes provide that neglected child means any child in situation dangerous to life or limb or injurious to health or morals of such child. State v. Randall ___ 64
3. Whether child neglected within purview of statute question of fact; each case determined from all facts and circumstances of each particular case. State v. Randall ___ 64
4. In cases involving child custody determinations in juvenile and other courts, findings of trial court, both as to evaluation of evidence and matter of custody, not disturbed unless clear abuse of discretion or decision against weight of evidence. State v. Randall ___ 64
5. Where parent has forfeited right to custody of children and custody awarded to someone other than parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change in custody. State ex rel. Sanders v. Doyle _ 453
6. In determining custody of children of tender years, court will give consideration to fact that children have formed natural attachment for person who has stood in relation of parents. State ex rel. Sanders v. Doyle ___ 453
7. Although preference of children as to custody not controlling, is factor that will be considered by court. State ex rel. Sanders v. Doyle ___ 453
8. Relinquishment of child for adoption made voluntarily and in accordance with provisions of statute not revocable. Kane v. United Catholic Social Services ___ 467
9. Parental rights may be terminated when parents have substantially and repeatedly neglected a child and refused to give necessary parental care and protection or when parent unfit by reason of lewd and lascivious behavior detrimental to health, morals, or well-being of child. Healey v. Naimie ___ 494
10. Gist of crime of child stealing is malicious, forcible, or fraudulent removal of child from custody of its legal custodian, with intent to unlawfully detain or conceal it from such custodian or parent, and consent of child immaterial and does not constitute

defense. State v. Randall ---------- 743
11. If a man induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is father of child with which she is pregnant, when unknown to him her condition caused by another, marriage may be annulled for fraud, if not ratified with knowledge thereof. Goree v. Goree ---------- 774
12. Custody of minor child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Marcus v. Huffman ---------- 798
13. Courts may not properly deprive parent of custody of minor child unless affirmatively shown that such parent unfit to perform duties imposed by that relationship or has forfeited that right. Marcus v. Huffman ---------- 798

Injunction.

1. Court of equity will not grant injunctive relief unless shown that injury has been or will be suffered by party seeking such relief. Muchemore v. Heflin 217
2. Injunction will not be granted unless right is clear, damage irreparable, and remedy at law inadequate to prevent failure of justice. Muchemore v. Heflin 217
3. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile ---------- 404
4. District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners ---------- 849

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1. If while criminal proceedings pending, facts brought to attention of court, either from own observation or from suggestion of counsel, which raise doubt as to sanity of defendant, question should be settled before further steps taken. State v. Boston ------ 388
2. Except as otherwise provided by statute, matter of granting hearing on issue of competency to stand trial rests in discretion of trial court. State v. Boston ---------- 388
3. Means employed in resolving question of sanity discretionary with court. State v. Boston ---------- 388

Instructions.

1. Prejudicial error for district court to submit to jury essential issue of fact without evidentiary support. Todd v. Boals ---------- 51
2. In absence of request, trial court not required to instruct in regard to lesser included offenses. State v. Warner ---------- 335
3. If court has instructed jury generally on law and has not withdrawn any essential issue from consideration by jury, error cannot be predicated on failure to charge on some particular phase of case unless proper instruction requested by party complaining. State v. Russo ---------- 348
4. Activities of thief ordinarily secretive and not usually carried out in presence of witnesses; when commission of offense carried out in such manner, circumstantial evidence necessarily only evidence available, and where many circumstances pointing to guilt of defendant, question for jury under proper instructions safeguarding rights of defendant. State v. Lowrey ---------- 451
5. Jury instructions must be considered collectively; if as whole they correctly state law, no error occurs, although one alone may be incomplete. State v. Black Bear ---------- 670
6. In absence of request for cautionary instruction with relation to previous similar offenses, not error for trial court to fail to give such instruction. State v. Randall ---------- 743
7. Duty of court not only to instruct as to what constitutes voluntary confession, but also to instruct jury to disregard alleged confession if found to be involuntary. State v. McDonald ---------- 752
8. Duty of trial court to instruct jury upon issues presented by pleadings and supported by evidence. Heavican v. Holbrook ---------- 814
9. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Middleton ---------- 821
   State v. Tolle ---------- 823
10. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. State v. Tolle -- 823

Insurance.

1. Policy of insurance given effect according to ordinary sense of terms used, and, if clear, applied according to their plain and ordinary meaning. Lydick v. Insurance Co. of North America ---------- 97
2. Where insurance policy limits liability to direct loss or damage, general rule that if windstorm combines with hazard expressly excluded from policy coverage to produce loss, insured may not recover. Lydick v. Insurance Co. of North America ---------- 97
3. Where initial permission to use insured vehicle given by one having proper authority to give permission to person operating it at time of accident, for purposes of liability coverage, such operation with express or implied permission of named insured, even though specific or express terms of permission given violated. Hull v. Allstate Ins. Co. ---------- 130
4. Insurer's duty to defend action against insured must, in first instance, be measured by allegations of petition against insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
5. Policy of insurance considered as any other contract to give effect to intention of parties at time made as expressed therein; language of it considered not in accordance with what insurer intended words to mean, but what reasonable person in position of insured would have understood them to mean. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
6. Exclusion in liability policy excluding from coverage injury to or destruction of any goods sold or work completed by named insured out of which accident arises eliminates any coverage for injury to or destruction of product furnished or work completed by named insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
7. Under exclusion in liability policy excluding from coverage injury to goods sold or work completed by named insured, if defect in product furnished or work completed by named insured causes damage to other property, no coverage for such damage to other property. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
8. Fire insurance policy legally issued in this state which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which conflict with state statutes to conform with

such statutes, subject to limitations set out in cited statute. Hiram Scott College v. Insurance Co. of North America ---------- 290

9. In automobile liability insurance policy, word household in omnibus clause extending liability available to insured to other members of household means those who dwell under same roof and compose a family. State Farm Mut. Auto. Ins. Co. v. Selders - 342

10. Statute requires uninsured motorist insurance for protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342

11. Purpose of statute to give same protection to person injured by uninsured motorist as he would have if had been injured in accident caused by automobile covered by standard liability policy; provisions to be liberally construed to accomplish such purpose. State Farm Mut. Auto. Ins. Co. v. Selders -------- 342

12. Policy of insurance given effect according to ordinary sense of terms used, and if clear, will be applied according to their plain and ordinary meaning. Brander v. Eagle Raceways, Inc. ---------- 508

13. Delivery of life insurance policy and acceptance of premiums raise presumption that all conditions precedent such as continued insurability met; this presumption sufficient to sustain plaintiff's burden of proof unless defendant introduces evidence to rebut it. Ortega v. North American Co. for L. & H. Ins. - 569

14. In absence of fraud or misrepresentation, health defect existing but undetected on date of medical examination cannot later be advanced as breach of continued insurability clause. Ortega v. North American Co. for L. & H. Ins. ---------- 569

15. If medical examination made by insurer, either with knowledge of illness of applicant thereby disclosed or without discovery of pathological condition which in fact existed, and thereupon issues policy of insurance, should not be allowed to repudiate liability by reason of defective health of insured at time of examination, in absence of fraud or misrepresentation. Ortega v. North American Co. for L. & H. Ins. 569

16. Where evidence introduced by insurer wholly insufficient to rebut presumption that plaintiff in good health at date of issuance of policy, error for trial court to submit such issues to jury. Ortega v. North American Co. for L. & H. Ins. ---------- 569

17. Generally, applicant for insurance has no duty to inform insurer of new information about his health where insurer fails to inquire into existence of any new information after medical examination. Ortega v. North American Co. for L. & H. Ins. ---------- 569
18. Claim for attorneys' fee after judgment in favor of plaintiff in action on fidelity policy or bond may be presented by motion at subsequent term of court. Beshaler v. Helberg ---------- 584
19. Objectively reasonable expectations of beneficiary-insured regarding terms of his insurance contract ordinarily will be honored. Nile Valley Coop. G. & M. Co. v. Farmers Elevator Mut. Ins. Co. -------- 720
20. Applicable part of "full reporting" clause in defendant's policy of provisional fire insurance issued to plaintiff construed to limit liability to that proportion of any loss which last reported value bears to actual value at time of report, provided liability does not exceed amount stated in schedule endorsement of policy. Nile Valley Coop. G. &. M. Co. v. Farmers Elevator Mut. Ins. Co. ---------- 720
21. Where applicable statutory provision conflicts with provisions of insurance policy, statute and not insurance policy controls. Rudder v. American Standard Ins. Co. of Wisconsin ---------- 778
22. Where words of statute plain, direct, and unambiguous, no interpretation needed to ascertain meaning. Rudder v. American Standard Ins. Co. of Wisconsin 778
23. Rules of interpretation resorted to for purpose of resolving ambiguity in statute, and not of creating it. Rudder v. American Standard Ins. Co. of Wisconsin ---------- 778

Intent.

1. Ordinarily voluntary intoxication no justification or excuse for crime, but excessive intoxication by which person wholly deprived of reason may prevent one from having intent charged. State v. Bevins ----- 785
2. In prosecution for receiving stolen property where facts known to defendant such that man of age, intelligence, and experience of defendant would know property to have been stolen, jury may properly find defendant possessed guilty knowledge. State v. Alcorn ---------- 854

Interest.

Claim liquidated so as to bear interest where deter-

mined or readily determinable; sufficient if ascertainable by computation or recognized standard. Mintken v. Nebraska Surety Co. ---------- 215

Intervention.

Judgment creditor who intervenes in creditor's suit obtains lien against fund from date of intervention. Steven v. Ford ---------- 401

Intoxicating Liquors.

1. Failure to reply to direct inquiry as to which test should be administered, as provided in Implied Consent Act, under circumstances enumerated, equivalent to refusal to take any tests. Johnson v. Dennis 95
2. Tests authorized by statute to be used in determining alcoholic content present in body fluid of person must be performed according to methods approved by Department of Health. State v. Parrott 213
3. Failure of officer to advise motorist subjected to breath or body-fluid test for intoxication that he could obtain additional test following that administered at direction of officer does not excuse motorist's failure to submit to such test. Zadina v. Weedlun ---------- 361
4. Foundation for admission into evidence of body fluid test showing compliance with provisions of cited statute sufficient. State v. Lilja ---------- 550

Intoxication.

Ordinarily voluntary intoxication no justification or excuse for crime, but excessive intoxication by which person wholly deprived of reason may prevent one from having intent charged. State v. Bevins ----- 785

Judgments.

1. Where court of equity properly acquired jurisdiction in suit for equitable relief, will make complete adjudication of all matters properly presented and involved in case and ordinarily grant such relief, legal or equitable, as required and thus avoid unnecessary litigation. Sechovec v. Harms ---------- 70
2. In suit where specific performance granted, all damages growing out of defendant's breach of contract litigable in specific performance action; separate subsequent actions to recover different elements of such damages for same breach cannot be maintained. Sechovec v. Harms ---------- 70

3. Summary judgment extreme remedy and should be awarded only when issue clear beyond all doubt; any reasonable doubt touching existence of genuine issue of material fact resolved against moving party. Hollamon v. Eagle Raceway, Inc. ---------- 221
Hiram Scott College v. Insurance Co. of North America ---------- 290
4. Summary judgment authorized when moving party entitled to judgment as matter of law, clear what truth is, and no genuine issue remains for trial. Hollamon v. Eagle Raceway, Inc. ---------- 221
5. Relief under Post Conviction Act limited to cases in which there was denial or infringement of rights of prisoner such as to render judgment void or voidable under Constitutions of this state or United States. State v. Bullard ---------- 334
6. Where default has been regularly entered, within discretion of trial court as to whether default judgment shall be set aside; in absence of showing of abuse of discretion, Supreme Court will not interfere. Michaelis v. Michaelis ---------- 350
7. Facts and circumstances in each case determine whether there has been abuse of discretion; among matters to be considered are promptness of motion to vacate, negligence or want of diligence of party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in administration of justice. Michaelis v. Michaelis ---------- 350
8. As prerequisite to examination in Supreme Court, evidence adduced on summary judgment hearing must be embodied in bill of exceptions. Scarpello v. Continental Assur. Co. ---------- 395
9. In absence of bill of exceptions in summary judgment proceeding, presumed that evidence sustains trial court's holding that no issue of fact presented by proceeding, was correctly decided, and only issue considered on appeal is sufficiency of pleadings to support judgment. Scarpello v. Continental Assur. Co. ---------- 395
10. Judgment creditor of beneficiary may bring creditor's suit to require distributive share in estate be applied toward payment of judgment. Steven v. Ford ---------- 401
11. Judgment creditor who brings creditor's suit obtains lien against fund from time of commencement of suit. Steven v. Ford ---------- 401
12. Where parent has forfeited right to custody of chil-

dren and custody awarded to someone other than parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change of custody. State ex rel. Sanders v. Doyle 453

13. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Belek v. Travelers Ind. Co. ---------- 470

14. Where party has sustained burden and expense of trial and succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless prejudicial error in proceedings by which it was secured. Beshaler v. Helberg -------- 584

15. Not sufficient for party seeking vacation of judgment or decree to show it was obtained by fraud of his adversary; petitioner must also show failure to obtain just decision not attributable to own fault or negligence. Flint v. Panter ---------- 615

16. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647

17. Ordinary burdens of trial insufficient for Supreme Court to classify otherwise interlocutory or partial summary judgment with orders that affect substantial rights. Grantham v. General Telephone Co. 647

18. Rule for consideration of motion for judgment notwithstanding verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648

19. If reasonable competent evidence to support findings of fact in trial court shown, judgment, order, or award will not be modified or set aside for insuffiency of evidence. Mid-America Pipeline Co. v. Warren ---------- 710

Judicial Sales.

1. Judicial sale advertised for front door of courthouse may be held at front of steps on first floor inside courthouse. Hollstein v. Adams ---------- 781

2. If publication day falls upon holiday, publication preceding day in weekly newspaper complies with statutory requirement that publication be had upon same day of week as first publication. Hollstein v. Adams ---------- 781

3. Mortgagor in foreclosure proceeding not entitled to personal service of published notice of sale. Hollstein v. Adams ---------- 781

4. Confirmation of judicial sale within discretion of trial court. Hollstein v. Adams ---------- 781

Jurisdiction.

1. Secretary of Interior having failed to accept offer of retrocession embraced in Legislative Resolution 37, Eightieth Session, Nebraska Legislature, 1969, before withdrawn by Legislative Resolution 16, Eighty-second Session, Nebraska Legislature, 1971, 18 U. S. C. A., section 1162, still applicable in Nebraska. State v. Goham ---------- 34
   State v. Tyndall ---------- 48
2. When accused committed offense of murder, State of Nebraska was exercising exclusive jurisdiction over criminal acts in Indian territory in Nebraska. Robinson v. Sigler ---------- 144
3. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
4. No acceptance of Public Law 280 required of State of Nebraska; by its terms applied to Nebraska, and only states not specifically mentioned required to accept its provisions if wanted to avail themselves of it. Robinson v. Sigler ---------- 144
5. Where court of equity obtains jurisdiction of cause for any purpose, may retain it for all and proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Freeman v. Rose ---------- 176
6. Right of workman to sue railroad company for wrongful discharge not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement, provided he has elected to consider employment at end and does not seek reinstatement. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
7. Right of member to sue his union not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement as these procedures have no reference to disputes between member and union. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
8. Section of Uniform Interstate and International Procedure Act applies when tortious act or omission

occurs in state even though resulting injury occurs elsewhere. Von Seggern v. Saikin ---------- 315
9. Section of Uniform Interstate and International Procedure Act authorizes exercise of jurisdiction when tortious act or omission takes place without state but injury occurs within state and there is some other reasonable connection between state and defendant. Von Seggern v. Saikin ---------- 315
10. Appearance "general" if party appearing invokes power of court on any question other than jurisdiction. Kohler v. Ford Motor Co. ---------- 428
11. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647
12. Ordinary burdens of trial insufficient for Supreme Court to classify otherwise interlocutory or partial summary judgment with orders that affect substantial rights. Grantham v. General Telephone Co. ---- 647
13. Since action for alimony and division of property not barred by Colorado divorce decree rendered on constructive service, district court for Box Butte County, Nebraska, had jurisdiction to entertain it. Mandelberg v. Mandelberg ---------- 844

Jury.

1. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Gutierrez 383
2. To be constitutionally impermissible, exclusion of any given sector of population from jury duty must be purposeful or intentional. State v. Gutierrez ------ 383
3. Use of voter registration lists or poll books for jury selection systems constitutionally permissible. State v. Gutierrez ---------- 383
4. Nebraska system of selecting jurors clearly within constitutional limits. State v. Gutierrez -------- 383
5. Weight and credibility of testimony of both lay and expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. 421
6. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. 421
7. When evidence in condemnation proceedings conflict-

ing, jury's verdict will not be set aside unless clearly wrong; not for reviewing court to decide which testimony jury should believe. Johnson v. Nebraska Public Power Dist. ---------- 421

8. Activities of thief ordinarily secretive and not usually carried out in presence of witnesses; when commission of offense carried out in such manner, circumstantial evidence necessarily only evidence available, and where many circumstances pointing to guilt of defendant, question for jury under proper instructions safeguarding rights of defendant. State v. Lowrey ---------- 451

9. Test by which jury shall determine sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Escamilla 457

10. Province of jury to determine circumstances surrounding, and which shed light upon, alleged crime; if, assuming as proved facts which evidence tends to establish, they can be accounted for upon no rational theory which does not include guilt of accused, proof cannot, as matter of law, be said to have failed. State v. Ortiz ---------- 515

11. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis ---------- 522

12. When new trial sought on ground of misconduct by jury, finding of trial court will not be set aside unless evidence of misconduct clear and convincing. Winston v. Davis ---------- 522

13. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522

14. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. 606

15. Credibility of witnesses and weight of evidence for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless clearly wrong. State v. Middleton ---------- 821
16. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Alcorn 854

Kidnapping.

1. Purpose of kidnapping in every instance to make possible to commit some other crime; very nature therefore embraces other crimes as well as that of kidnapping. Penalties of kidnapping intentionally more severe than other crimes which may be included because of consequences which often result from its perpetration. State v. Goham ---------- 34
2. Gist of crime of child stealing is malicious, forcible, or fraudulent removal of child from custody of its legal custodian, with intent to unlawfully detain or conceal it from such custodian or parents, and consent of child immaterial and does not constitute defense. State v. Randall ---------- 743

Labor and Labor Relations.

1. Right of workman to sue railroad company for wrongful discharge not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement, provided he has elected to consider employment at end and does not seek reinstatement. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
2. Right of member to sue his union not dependent upon prior exhaustion of administrative remedies under Railway Labor Act and collective bargaining agreement as these procedures have no reference to disputes between member and union. Poppert v. Brotherhood of R. R. Trainmen ---------- 297

Landlord and Tenant.

1. In event of sale of school lands to third person, tenant has right to compensation resulting from "improvements" compensable under lease statutes. State v. Rosenberger ---------- 726
2. Value of tenant's interest resulting from "improvements" on school lands required to be determined prior to sale of land. State v. Rosenberger ---------- 726

Larceny.

In prosecution for larceny in Nebraska, lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Simons ---------- 761

Legislature.

1. Unless Legislature otherwise provides, funds properly expended by receiving high school district from state and federal aid includable in computation of per pupil costs under provisions of cited statute. Werth v. Buffalo County Board of Equalization -- 119
2. Establishment of school district boundaries purely legislative matter. Kaup v. Sweet ---------- 226
3. In order to find provision of Constitution restricts plenary power of Legislature to tax Metropolitan Utilities District, language of restriction must be clearly applicable. Evans v. Metropolitan Utilities Dist. ---------- 261
4. Public corporation authorized by Legislature and organized pursuant thereto to carry out functions determined for public purpose and general welfare of people is arm or branch of government for this purpose and under plenary control of Legislature. Evans v. Metropolitan Utilities Dist. ---------- 261
5. Constitution not grant but rather restriction of legislative power; taxing power vested in Legislature without limit except as may be prescribed by Constitution itself; consequently, courts can enforce only those limits which Constitution clearly imposes. Evans v. Metropolitan Utilities Dist. ---------- 261
6. In proper construction of constitutional provisions, limitations or restrictions upon power of taxation can never be raised by implication, but intention to impose them must be expressed in clear, unambiguous language. Evans v. Metropolitan Utilities Dist. 261
7. Cited statute constitutional; Legislature may abrogate right of action for tort to happen in future. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
8. In order to justify courts in declaring invalid as delegation of legislative power a statute conferring particular duties or authority upon administrative officers, must clearly appear beyond reasonable doubt that duty or authority so conferred is power that appertains exclusively to legislative department, and conferring not warranted by provisions of Constitu-

tion. Shear v. County Board of Commissioners ---- 849
9. Legislature has complete power and authority to prescribe qualifications for office of county assessor, limited only by requirement that such conditions of eligibility shall not be unreasonable. Shear v. County Board of Commissioners ---------- 849
10. Competent for Legislature to classify for purposes of legislation, if classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest justice or expediency of diverse legislation with respect to objects to be classified. Shear v. County Board of Commissioners ---------- 849

Libel and Slander.

Actions at law for false arrest, false imprisonment, and libel and slander remain subject to defense of governmental immunity. Webber v. Andersen ---- 9

Liens.

1. Lein of materialman for material furnished contractor not dependent upon contract existing between materialman and owner; lien given because material furnished used in construction of building or other structure. Paxton & Vierling Steel Co. v. Barmore 54
2. Cited statute makes no requirement concerning contract between materialman and contractor; if contract and delivery, or furnishing under it, sufficient to create indebtedness or liability, sufficient to create lien. Paxton & Vierling Steel Co. v. Barmore ---- 54
3. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
4. Judgment creditor of beneficiary may bring creditor's suit to require distributive share in estate be applied toward payment of judgment. Steven v. Ford ---------- 401
5. Judgment creditor who brings creditor's suit obtains lien against fund from time of commencement of suit. Steven v. Ford ---------- 401
6. Judgment creditor who intervenes in creditor's suit obtains lien against fund from date of intervention. Steven v. Ford ---------- 401

Limitations of Actions.

1. Fire insurance policy legally issued in this state

which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which conflict with state statutes to conform with such statutes, subject to limitations set out in cited statute. Hiram Scott College v. Insurance Co. of North America ---------- 290

2. Cause of action pleaded by amendment ordinarily relates back to original pleading for limitation purposes, provided claimant seeks recovery on same general set of facts. Kohler v. Ford Motor Co. -- 428

3. Action to foreclose real estate mortgage may be brought within period of limitation provided by cited statute even though action on debt barred. J. I. Case Credit Corp. v. Thompson ---------- 626

4. Section 18-1717, R. R. S. 1943, enacted with emergency clause on April 29, 1967, provides for 1-year limitation period in which party may contest any annexation or contest any act done prior to such date, pursuant to such annexation which was made pursuant to any statute of Nebraska which has been on April 29, 1967, declared unconstitutional. Nebraska Mil-Nic, Inc. v. City of Grand Island ---- 656

5. Special statute of limitations, where applicable, controls over general statute of limitations because special statute one that more properly expresses legislative will. Nebraska Mil-Nic, Inc. v. City of Grand Island ---------- 656

Mandamus.

District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners ---------- 849

Marriage.

1. In Nebraska, voidable marriage legally valid for all civil purposes until nullity so pronounced. Ballew v. Ballew ---------- 397

2. Under divorce decree providing alimony payments shall terminate upon remarriage of wife, right of divorced wife to receive such payments terminated upon remarriage and not revived by annulment of her remarriage on grounds which rendered remarriage voidable. Ballew v. Ballew ---------- 397

Master and Servant.

1. Relation of master and servant cannot be defined in general terms with substantial accuracy. Todd v. Boals ---------- 51
2. General test in determining whether employee servant of original master, or of party to whom has been furnished, whether in particular service which he is engaged to perform he continues to be liable to direction and control of master, or becomes subject to that of party to whom he is lent or hired. Mid-America Pipeline Co. v. Warren ---------- 710
3. Rule stated as to relationship of employee between original master and new master to whom loaned. Mid-America Pipeline Co. v. Warren ---------- 710
4. Before new relationship from original master to new master can be made effective, servant must understand he is submitting himself to control of new master. Mid-America Pipeline Co. v. Warren _ 710

Mortgages.

1. Auctioneer operating as market agency under Federal Packers and Stockyards Act and who sells mortgaged cattle at request of mortgagors not relieved from liability for conversion by terms of act. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
2. Action to foreclose real estate mortgage may be brought within period of limitation provided by cited statute even though action on debt barred. J. I. Case Credit Corp. v. Thompson ---------- 626
3. Mortgagor in foreclosure proceeding not entitled to personal service of published notice of sale. Hollstein v. Adams ---------- 781

Motions, Rules, and Orders.

1. Motion to withdraw plea of guilty sustained only if defendant proves withdrawal necessary to correct manifest injustice and defendant must establish such ground by clear and convincing evidence. State v. Johnson ---------- 26
2. Entertainment of belated motion to strike testimony, no proper objection having been previously made, discretionary with trial court. Kohler v. Ford Motor Co. ---------- 428
3. Post Conviction Act requires that unless motion and files and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hear-

ing, determine issues, and make findings of fact and conclusions of law with respect thereto. State v. Reichel ---------- 464

4. Motion for relief under Post Conviction Act must state all grounds available to prisoner as basis for relief at time motion filed. State v. Reichel ---- 464

5. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Reichel -- 464

6. Motion for continuance addressed to sound discretion of court; in absence of showing of abuse of discretion, ruling on motion for continuance not disturbed. Jindra v. S. M. S. Trucking Co. --------- 502

7. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522

8. Railway commission has jurisdiction to reconsider and vacate order on own motion within 30 days after mailing of copy of order and before appeal taken; upon expiration of 30 days from mailing copy of order, or upon appeal being perfected, power of commission to reconsider order on own motion terminates. Andrews Van Lines, Inc. v. Smith ---------- 533

9. Transfer of operating rights may be approved after notice and hearing if railway commission finds transaction will be consistent with public interest, does not unduly restrict competition, and applicant fit, willing, and able to perform service. Andrews Van Lines, Inc. v. Smith ---------- 533

10. Order of railway commission which fails to make findings of ultimate facts irregular and will be set aside upon appeal. Andrews Van Lines, Inc. v. Smith ---------- 533

11. Jurisdiction of Supreme Court over appeals from district court based on final judgments or orders; order that affects substantial right in special proceeding final. Grantham v. General Telephone Co. 647

12. Ordinary burdens of trial insufficient for Supreme Court to classify otherwise interlocutory or partial

summary judgment with orders that affect substantial rights. Grantham v. General Telephone Co. 647
13. Rule for consideration of motion for judgment notwithstanding verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648
14. Rule for consideration of motion for directed verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648
15. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. State v. Tolle -- 823
16. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Tolle ---------- 823

Motor Vehicles.

1. Failure to reply to direct inquiry as to which test should be administered, as provided in Implied Consent Act, under circumstances enumerated, equivalent to refusal to take any tests. Johnson v. Dennis ---------- 95
2. Revocation of license to operate motor vehicle under point system ministerial act. Westenburg v. Weedlun ---------- 679
3. When records disclose that any person has accumulated total of 12 or more points within 2 years, Director of Motor Vehicles required by statute to summarily revoke license and privileges of such person to operate motor vehicle in this state. Westenburg v. Weedlun ---------- 679
4. Ministerial administrative authority vested in Director of Motor Vehicles by statute requires he apply applicable violation sections of motor vehicle statute to information properly furnished to him. Westenburg v. Weedlun ---------- 679
5. Under cited statute, possession of mini-bike without certificate of registration prima facie evidence of unlawful possession and concealment. State v. Oltjenbruns ---------- 694
6. When materials in plain sight within motor vehicle indicative of criminal offense, subsequent search justified and legal. State v. Oltjenbruns ---------- 694
7. In absence of statute or ordinance, meaning to be given to traffic control signal that which a reasonably prudent motorist would understand and apply.

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8. As general rule, motorist who enters intersection when signal in his favor entitled to continue through intersection even though signal changes after he has entered intersection. Heavican v. Holbrook --- 814
9. Motorist intending to make left turn at intersection, where left turns controlled by separate traffic signal light, may enter intersection on favorable signal and complete turn even though signal changes after he entered intersection. Heavican v. Holbrook 814
10. Motorist intending to make left turn, who would otherwise have right-of-way over through traffic, may lose right-of-way by stopping in intersection and yielding right-of-way to through traffic before completing turning movement. Heavican v. Holbrook ---------- 814

Municipal Corporations.
1. Common law rule of governmental immunity not completely abrogated in this state by judicial pronouncement. Webber v. Andersen ---------- 9
2. Actions at law for false arrest, false imprisonment, and libel and slander remain subject to defense of governmental immunity. Webber v. Andersen --- 9
3. Public officers not responsible for acts of subordinate officials, if such subordinates themselves employees of government, where no negligence on part of such public officials in employing them, unless superior officer directed, encouraged, or ratified such acts, or personally cooperated therein. Webber v. Andersen ---------- 9
4. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen ----- 9
5. Word "airport" in clause "any city * * * owning or operating an airport" in Cities Airport Authorities Act, means airport qualified and licensed for public use. Elliott v. City of Plattsmouth ---------- 165
6. "Municipal corporations," as used in Article VIII, section 7, Constitution of Nebraska, refers to municipal corporations in strict and legal sense of those which exercise governmental functions, as distinguished from proprietary functions. Evans v. Metropolitan Utilities Dist. ---------- 261
7. Under cited statute, city of first class may annex

contiguous lands, urban or suburban in character, and not agricultural lands rural in character. Webber v. City of Scottsbluff ---------- 282
8. Cited statute does not require that minutes of meeting of city council embody full text of ordinance enacted thereat; sufficient if minutes set forth fully proceedings thereon showing statutory requirements complied with and ordinance sufficiently identified therein and preserved in volume or file separate from minutes. Webber v. City of Scottsbluff ---- 282
9. Power of city to annex lands contiguous to city and within boundaries of rural fire protection district not limited by provisions of cited statute. Webber v. City of Scottsbluff ---------- 282
10. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile -------- 404
11. What is public good as relates to zoning ordinances affecting use of property primarily matter lying within discretion and determination of municipal body to which power and function of zoning committed; unless abuse of discretion clearly shown, not province of courts to interfere. J. W. Auto Parts, Inc. v. City of Omaha ---------- 624
12. Section 18-1717, R. R. S. 1943, enacted with emergency clause on April 29, 1967, provides for 1-year limitation period in which party may contest any annexation or contest any act done prior to such date, pursuant to such annexation which was made pursuant to any statute of Nebraska which has been on April 29, 1967, declared unconstitutional. Nebraska Mil-Nic, Inc. v. City of Grand Island ---- 656

Negligence.

1. Public officers not responsible for acts of subordinate officials, if such subordinates themselves employees of government, where no negligence on part of such public officials in employing them, unless superior officer directed, encouraged, or ratified such acts, or personally cooperated therein. Webber v. Andersen ---------- 9
2. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen --------- 9

3. Duty of contractor engaged in construction work on public highway generally to warn public that highway dangerous to travel. Gorges v. Dobson Bros. Constr. Co. ---------- 19
4. Ordinarily no duty upon contractor engaged in construction work upon public highway to erect structure that will prevent forcible entry into area of construction. Gorges v. Dobson Bros. Constr. Co. - 19
5. Where act one which reasonable man would recognize as involving risk of harm to another, risk unreasonable and act negligent if risk of such magnitude as to outweigh what law regards as utility of act or of particular manner in which done. Johnson v. Municipal University of Omaha ---------- 24
6. Physical facts sufficient to bar recovery for negligence only when indisputably demonstrate that collision out of which cause of action arose not caused by party charged. Meyer v. Lang ---------- 202
7. When employee's injuries caused by willful negligence, may not recover compensation. Bole v. S. M. S. Trucking Co. ---------- 341
8. Manufacturer strictly liable in tort when article he places on market, knowing it is to be used without inspection for defects, proves to have defect that causes injury to person rightfully using article. Kohler v. Ford Motor Co. ---------- 428
9. Conditions affecting visibility of motorist impose upon driver duty to use degree of care commensurate with existing circumstances. Hacker v. Perez 485
10. Circumstantial evidence sufficient to sustain charge of unlawful speed and may be sufficient to overcome direct evidence. Hacker v. Perez ---------- 485
11. Operator of motor vehicle who would otherwise have right-of-way under statutory regulations if operates it at lawful rate of speed may forfeit right-of-way if operates vehicle at unlawful rate. Hacker v. Perez 485
12. Statute granting right-of-way to driver of emergency vehicle, over other drivers using highway, does not relieve him from responsibility of driving with due regard for safety of all persons on highway, and does not protect him from consequences of arbitrarily exercising such right-of-way. Winston v. Davis ---------- 522
13. Rules stated as to duty of driver of vehicle upon highway to yield right-of-way to law enforcement vehicles when operated on official business; and when provision shall not operate to relieve driver of law

enforcement vehicle from duty to drive with due regard for safety of others. Winston v. Davis ___ 522
14. Rule for determination of right-of-way at intersections stated. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
15. Operator of automobile approaching or entering intersection required to see another automobile approaching or entering intersection which has been favored with right-of-way under statutory rules of road and failure to see such favored automobile negligence as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
16. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ------ 606
17. Where evidence clear that only person within class for which action may be brought under cited statute guilty of negligence as matter of law, duty of court to direct verdict for defendant. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606
18. Not sufficient for party seeking vacation of judgment or decree to show it was obtained by fraud of his adversary; petitioner must also show failure to obtain just decision not attributable to own fault or negligence. Flint v. Panter ---------- 615
19. Rule stated as to duties of driver approaching unprotected intersection at speed as will afford reasonable opportunity for effective observations for cars approaching on intersecting road or when view completely obstructed. Where facts undisputed, negligence may be found as matter of law. Hodgson v. Gladem ---------- 736
20. As general rule, motorist who enters intersection when signal in his favor entitled to continue through intersection even though signal changes after he has entered intersection. Heavican v. Holbrook ------- 814
21. Motorist intending to make left turn at intersection, where left turns controlled by separate traffic signal light, may enter intersection on favorable signal and complete turn even though signal changes after he entered intersection. Heavican v. Holbrook 814
22. Motorist intending to make left turn, who would otherwise have right-of-way over through traffic,

may lose right-of-way by stopping in intersection and yielding right-of-way to through traffic before completing turning movement. Heavican v. Holbrook 814

New Trial.

1. Rule is that new trial not granted on grounds of newly discovered evidence when only effect of evidence to impeach or discredit witness. State v. Goham ---------- 34
2. Refusal of trial court in criminal case to direct prosecutor to accept offer by defendant to stipulate to essential element of alleged offense ordinarily constitutes no ground for new trial. State v. Narcisse 209
3. Motion for new trial on ground of newly discovered evidence addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Evans ------- 474
4. New cumulative evidence tendered in support of motion for new trial must be so potent that, by strengthening evidence already offered, new trial would probably result in different verdict. State v. Evans ---------- 474
5. New trial not ordinarily granted for newly discovered evidence which, when produced, will merely impeach or discredit witness who testified at trial. State v. Evans ---------- 474
6. When new trial sought on ground of misconduct by jury, finding of trial court will not be set aside unless evidence of misconduct clear and convincing. Winston v. Davis ---------- 522
7. Where motion for new trial presents question of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522
8. Where party has sustained burden and expense of trial and succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless prejudicial error in proceedings by which it was secured. Beshaler v. Helberg ---- 584
9. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Middleton ---------- 821
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10. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. State v. Tolle -- 823

Notice.

1. Court should not correct erroneous record of criminal sentence without affording parties hearing. State v. Cruse ---------- 331
2. Term notice in cited statute refers to actual notice and does not include constructive notice afforded by perfection and recording of security instrument. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
3. Properly conducted existing local savings and loan associations have interests and rights which are affected by establishment of other local savings and loan associations or branches sufficient to make all such associations interested parties entitled to constitutional due process. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
4. Due process of law requires notice and opportunity to be heard, as matter of right and not by let or leave of administrative officers or agencies, when rights, duties, or privileges of interested parties involved by exercise of quasi-judicial power pursuant to terms of statute. First Fed. Sav. & Loan Assn. v. Department of Banking ---------- 562
5. Compliance with mandatory provisions of cited statute requiring administrative agency to adopt appropriate rules of procedure for notice and hearing necessary to give validity to its action when notice and hearing essential to due process. First Fed. Sav. & Loan Assn. v. Department of Banking ----- 562
6. Notice that will and codicil being offered for probate sufficient to put party receiving notice upon inquiry to determine what documents being offered for probate. Flint v. Panter ---------- 615
7. Judicial sale advertised for front door of courthouse may be held at front of steps on first floor inside courthouse. Hollstein v. Adams ---------- 781
8. If publication day falls upon holiday, publication preceding day in weekly newspaper complies with statutory requirement that publication be had upon same day of week as first publication. Hollstein v. Adams ---------- 781
9. Mortgagor in foreclosure proceeding not entitled to personal service of published notice of sale. Holl-

stein v. Adams ---------- 781

Oil and Gas.

1. Chapter 57, article 9, R. R. S. 1943, contemplates that determination of correlative rights of adjoining owners in pool of oil or gas shall be determined on fair, reasonable, and equitable basis. Farmers Irr. Dist. v. Schumacher ---------- 825
2. Correlative rights must be determined and fixed on basis of circumstances present in each individual case. Farmers Irr. Dist. v. Schumacher ---------- 825
3. Pooling order allocating shares in production of well, and costs encountered, may be made retroactive when equity and justice require. Farmers Irr. Dist. v. Schumacher ---------- 825
4. Ordinarily, adjoining owner not justified in awaiting successful outcome of drilling operations before entering into pooling agreement or applying for pooling order. Farmers Irr. Dist. v. Schumacher - 825

Ordinances.

1. Cited statute does not require that minutes of meeting of city council embody full text of ordinance enacted thereat; sufficient if minutes set forth fully proceedings thereon showing statutory requirements complied with and ordinance sufficiently identified therein and preserved in volume or file separate from minutes. Webber v. City of Scottsbluff ---------- 282
2. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. City of Imperial v. Raile ---------- 404
3. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile ---------- 404
4. Party must plead and prove existence of municipal ordinance in order to have benefit of ordinance. Heavican v. Holbrook ---------- 814
5. In absence of statute or ordinance, meaning to be given to traffic control signal that which a reasonably prudent motorist would understand and apply. Heavican v. Holbrook ---------- 814

Parent and Child.

1. In cases involving child custody determinations in juvenile and other courts, findings of trial court,

both as to evaluation of evidence and matter of custody, not disturbed unless clear abuse of discretion or decision against weight of evidence. State v. Randall ---------- 64

2. Discretion of lower court with respect to awarding or changing custody and support of minor children subject to review; but determination of court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Hanson v. Hanson ---------- 108

3. Ordinarily, custody of minor children awarded to mother in divorce action not disturbed unless by changed circumstances affirmatively shown that mother unfit person to have custody or that best interests of children require such action. Benton v. Benton ---------- 205

4. Trial court's order in child support case not overturned unless abuse of discretion by trial court found. Benton v. Benton ---------- 205

5. Courts take judicial notice of ordinary costs of living and dental, medical, and other familiar costs of living. Benton v. Benton ---------- 205

6. Father primarily liable for support of his children independent of assets of wife and mother. Benton v. Benton ---------- 205

7. Measure of damages for action for wrongful death of minor child is pecuniary loss which parent sustains by reason of being deprived of child's services during his minority and loss of contributions that might reasonably be expected to be made after reaching his majority. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342

8. Adoption and right to take property by descent or inheritance strictly statutory and exclusively within legislative control. Neil v. Masterson ---------- 364

9. Nebraska, recognizing humanitarian aspects and purposes of adoption statutes, gives them liberal rather than strict construction. Neil v. Masterson ------ 364

10. Adoption statute must be construed together with statutes of descent and distribution. Neil v. Masterson ---------- 364

11. Intention of statute that next of kin of adoptive parents shall have same right to inherit property from adoptive child as they would have from natural child of said adoptive parents. Neil v. Masterson -- 364

12. Where parent has forfeited right to custody of children and custody awarded to someone other than

parent, ordinarily fact that parent now rehabilitated not sufficient change in circumstances to require change in custody. State ex rel. Sanders v. Doyle -- 453

13. In determining custody of children of tender years, court will give consideration to fact that children have formed natural attachment for person who has stood in relation of parent. State ex rel. Sanders v. Doyle ---------- 453

14. Although preference of children as to custody not controlling, is factor that will be considered by court. State ex rel. Sanders v. Doyle ---------- 453

15. Relinquishment of child for adoption made voluntarily and in accordance with provisions of statute not revocable. Kane v. United Catholic Social Services ---------- 467

16. Parental rights may be terminated when parents have substantially and repeatedly neglected a child and refused to give necessary parental care and protection or when parent unfit by reason of lewd and lascivious behavior detrimental to health, morals, or well-being of child. Healey v. Naimie ---------- 494

17. Child custody statutes of Nebraska to be liberally construed to accomplish purpose of serving best interests of children involved. Healey v. Naimie ---- 494

18. In post-divorce custody proceeding, determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within discretion of trial court; on appeal, Supreme Court will not disturb determination except to remedy abuse of discretion. Lueders v. Lueders ---------- 539

19. Gist of crime of child stealing is malicious, forcible, or fraudulent removal of child from custody of its legal custodian, with intent to unlawfully detain or conceal it from such custodian or parent, and consent of child immaterial and does not constitute defense. State v. Randall ---------- 743

20. Custody of minor child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Marcus v. Huffman ---------- 798

21. Courts may not properly deprive parent of custody of minor child unless affirmatively shown that such parent unfit to perform duties imposed by that relationship or has forfeited that right. Marcus v. Huffman ---------- 798

Parties.

1. In action which challenges legality in whole or part of levy made under provisions of nonresident high school tuition act, receiving school districts to which tuition claims paid from fund necessary parties. Werth v. Buffalo County Board of Equalization ---- 119
2. Where evidence insufficient to sustain verdict in favor of plaintiff, duty of trial court to dismiss action on motion of defendant. Sinnett v. Dial Constr. Co. ---------- 190
3. Summary judgment extreme remedy and should be awarded only when issue clear beyond all doubt; any reasonable doubt touching existence of genuine issue of material fact resolved against moving party. Hollamon v. Eagle Raceway, Inc. ---------- 221
4. Summary judgment authorized when moving party entitled to judgment as matter of law, clear what truth is, and no genuine issue remains for trial. Hollamon v. Eagle Raceway, Inc. ---------- 221
5. Parties claiming interest in property of decedent by reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
6. Appearance "general" if party appearing invokes power of court on any question other than jurisdiction. Kohler v. Ford Motor Co. ---------- 428
7. In determining sufficiency of evidence to sustain verdict, party entitled to resolution of all conflicts of evidence in his favor and all reasonable inferences that can be reasonably deduced from proof. Kohler v. Ford Motor Co. ---------- 428
8. District court may determine any controversy between parties before it, when can be done without prejudice to rights of others, or by saving their rights; but when determination of controversy cannot be had without presence of other parties, court must order them brought in. Bailey v. McCoy ---- 618

Partnerships.

1. Parties claiming interest in property of decedent by reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
2. Partnership may continue, although it admits partner or partner retires. Bailey v. McCoy ---------- 618
3. Agreement in many respects is law of partnership. Bailey v. McCoy ---------- 618

4. In service partnership agreement with provision that partners base payment for good will on annual income, word "income" ordinarily imports net profits. Bailey v. McCoy ---------- 618

Payment.

In absence of fraud, mistake, or duress, giving of check by debtor to creditor in payment of account, without clearly defined reservations, ordinarily creates an account stated. Hansen v. Abbott ------ 248

Penalties.

No person who as result of mental disease or defect shall undergo sentence for commission of offense so long as such incapacity endures. State v. Saxon -- 338

Plea Bargaining.

1. When defendant seeks to withdraw plea of guilty or nolo contendere allegedly made in reliance upon promise of prosecutor of recommendation favorable to defendant, which promise not kept, burden of proof on defendant to prove unfulfilled promise and reliance thereon. State v. Krug ---------- 551
2. Proper for court to grant charge and sentence concessions to defendants who plead guilty when interest of public in effective administration of criminal justice would be served. State v. Black Bear - 670

Pleadings.

1. General demurrer to cause of action for negligence must be based on pleading of facts and not mere allegations of conclusions of law. Webber v. Andersen ---------- 9
2. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles ---------- 105
3. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Myles -- 105
4. While petition may be attacked at any stage of proceedings on grounds of insufficiency to state cause of action, where attack delayed until appeal, pleading liberally construed. Bader v. Hodwalker ------ 138
5. Transfer from nonaccredited school district to accredited one states sufficient reason for transfer. Bader v. Hodwalker ---------- 138

6. Insurer's duty to defend action against insured must, in first instance, be measured by allegations of petition against insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
7. Abuse of discretion for trial court to refuse to permit amendment in furtherance of justice. Poppert v. Brotherhood of R. R. Trainmen ---------- 297
8. Liability of estate for inheritance tax may be determined upon petition of executrix filed in administration proceeding. Reller v. McArthur ---------- 313
9. Bald assertions of insanity, unsubstantiated by recital of credible facts and unsupported by record, wholly insufficient and justify summary dismissal of post conviction proceeding. State v. Virgilito -- 328
10. Post Conviction Act requires that unless motion, files, and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito ---------- 328
11. Facts and circumstances in each case determine whether there has been abuse of discretion; among matters to be considered are promptness of motion to vacate, negligence or want of diligence of party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in administration of justice. Michaelis v. Michaelis ---------- 350
12. In absence of bill of exceptions in summary judgment proceeding, presumed that evidence sustains trial court's holding that no issue of fact presented by proceeding, was correctly decided, and only issue considered on appeal is sufficiency of pleadings to support judgment. Scarpello v. Continental Assur. Co. ---------- 395
13. Cause of action pleaded by amendment ordinarily relates back to original pleading for limitation purposes, provided claimant seeks recovery on same general set of facts. Kohler v. Ford Motor Co. -- 428
14. Motion for relief under Post Conviction Act must state all grounds available to prisoner as basis for relief at time motion filed. State v. Reichel ---- 464
15. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion

for post conviction relief. State v. Reichel ------- 464
16. No decree of divorce and of nullity of marriage shall be made solely on declarations, confessions, or admissions of parties, but court shall, in all cases, require other satisfactory evidence of facts alleged in petition for that purpose. Goree v. Goree ----- 774
17. Where party affirmatively pleads existence of fact material to issue, he assumes burden of proving such fact. Bishoff v. Pieper ---------- 783
18. Duty of trial court to instruct jury upon issues presented by pleadings and supported by evidence. Heavican v. Holbrook ---------- 814
19. Party must plead and prove existence of municipal ordinance in order to have benefit of ordinance. Heavican v. Holbrook ---------- 814

Post Conviction.

1. When indigent defendant has made known to court he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by court or lack of action on part of his attorney. State v. Myles ---------- 105
2. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Myles --- 105
State v. Hatten ---------- 237
State v. Rhodes ---------- 332
3. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show good faith action and that appeal has merit, has failed to sustain required burden of proof. State v. Myles ---------- 105
4. Bald assertions of insanity, unsubstantiated by recital of credible facts and unsupported by record, wholly insufficient and justify summary dismissal of post conviction proceeding. State v. Virgilito --------- 328
5. Post Conviction Act requires that unless motion, files, and records of case show petitioner entitled to no relief, court shall grant prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito ---------- 328
State v. Reichel ---------- 464
6. Standard for validity of guilty plea is whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Cruse ---------- 331
7. Relief under Post Conviction Act limited to cases in

which there was denial or infringement of rights of prisoner such as to render judgment void or voidable under Constitutions of this state or United States. State v. Bullard ---------- 334
8. Defendant who has appealed conviction cannot secure second review of identical propositions advanced in such appeal by resort to post conviction procedure. State v. Franklin ---------- 363
9. Motion for relief under Post Conviction Act must state all grounds available to prisoner as basis for relief at time motion filed. State v. Reichel ---- 464
10. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Reichel -- 464
11. Where defendant in criminal case invokes appellate jurisdiction of Supreme Court, no post conviction remedy then available to him; post conviction remedy cumulative, not concurrent. State v. Moore -- 507
12. In absence of violation or infringement of constitutional right, no relief may be had under Post Conviction Act. State v. Whited ---------- 592
13. For post conviction relief on ground of ineffective assistance of counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Mason ---------- 675

Powers.

1. Power of Congress over Indian affairs plenary and cannot be limited by treaty. Robinson v. Sigler -- 144
2. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
3. Under Article X, section 7, Constitution of Nebraska, and cited statute, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in charging of fares by common carriers, vested in railway commission. Allen v. Omaha Transit Co., Inc. ---------- 156
4. Cited statute delegates to railway commission quasi-judicial power to determine issue of unjust discrim-

ination in charging of fares by common carriers under standards therein set out, and vests railway commission with quasi-judicial power to examine facts and determine questions of law. Allen v. Omaha Transit Co., Inc. ---------- 156

5. Generally, railway commission, in different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Allen v. Omaha Transit Co., Inc. ---------- 156
6. Railway commission does not have authority to determine validity of contracts for purchase of certificates of public convenience and necessity. Schmer v. Abler ---------- 245
7. Existence of dispute regarding enforceability of contract for transfer of certificate of public convenience and necessity does not deprive railway commission of power to approve transfer. Schmer v. Abler ---------- 245
8. In order to find provision of Constitution restricts plenary power of Legislature to tax Metropolitan Utilities District, language of restriction must be clearly applicable. Evans v. Metropolitan Utilities Dist. ---------- 261
9. Public corporation authorized by Legislature and organized pursuant thereto to carry out functions determined for public purpose and general welfare of people is arm or branch of government for this purpose and under plenary control of Legislature. Evans v. Metropolitan Utilities Dist. ---------- 261
10. Constitution not grant but rather restriction of legislative power; taxing power vested in Legislature without limit except as may be prescribed by Constitution itself; consequently, courts can enforce only those limits which Constitution clearly imposes. Evans v. Metropolitan Utilities Dist. ---------- 261
11. In proper construction of constitutional provisions, limitations or restrictions upon power of taxation can never be raised by implication, but intention to impose them must be expressed in clear, unambiguous language. Evans v. Metropolitan Utilities Dist. ---------- 261

Principal and Agent.

1. Undisclosed principal ordinarily bound by contracts made on his account by agent acting within his authority. Mintken v. Nebraska Surety Co. ----- 215
2. Agent not authorized to endorse commercial paper

unless otherwise agreed or endorsement usually incident to performance of acts he is authorized to perform for principal. Farmers Union Coop Assn. v. Commercial State Bank ---------- 376
3. If agent within his authority receives cash for endorsement and delivery of commercial paper payable to principal, payer not responsible for payment of amount to principal or its application to principal's uses. Farmers Union Coop Assn. v. Commercial State Bank ---------- 376

Probable Cause.
1. In warrantless search, controlling factor whether officer had reasonable grounds before search to make arrest; essential test whether facts available at moment of search would warrant man of reasonable caution to believe action taken appropriate; existence of probable cause must be determined by practical, not by any technical, standard. State v. Oltjenbruns ---------- 694
2. Habeas corpus is writ of right but not writ of course, and probable cause for its allowance must be shown. Middlebrook v. Sigler ---------- 705

Probation and Parole.
1. Whether defendant sentenced or placed on probation matter within discretion of trial court. State v. Gutierrez ---------- 383
2. Suspension of sentence and granting of probation discretionary with trial court and in absence of abuse of discretion, trial court's determination will not be disturbed. State v. Jurgens ---------- 557
State v. Clifton ---------- 714
3. Sentence not involving confinement preferred to sentence involving partial or total confinement in absence of affirmative reasons to contrary. State v. Shonkwiler ---------- 747
4. Statement by defendant before sentencing that Viet Nam war immoral and if drafted he would not bear arms in that war does not constitute justifiable reason for refusing probation to otherwise qualified defendant. State v. Shonkwiler ---------- 747

Property.
1. Lien of materialman for material furnished contractor not dependent upon contract existing between materialman and owner; lien given because material

furnished used in construction of building or other structure. Paxton & Vierling Steel Co. v. Barmore 54
2. Cited statute makes no requirement concerning contract between materialman and contractor; if contract and delivery, or furnishing under it, sufficient to create indebtedness or liability, sufficient to create lien. Paxton & Vierling Steel Co. v. Barmore --- 54
3. Exclusion in liability policy excluding from coverage injury to or destruction of any goods sold or work completed by named insured out of which accident arises eliminates any coverage for injury to or destruction of product furnished or work completed by named insured. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
4. Under exclusion in liability policy excluding from coverage injury to goods sold or work completed by named insured, if defect in product furnished or work completed by named insured causes damage to other property, no coverage for such damage to other property. Hartford Acc. & Ind. Co. v. Olson Bros., Inc. ---------- 179
5. Parties claiming interest in property of decedent by reason of alleged partnership with decedent are adverse to decedent and his representatives. Hays v. Johnson ---------- 307
6. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur ---------- 313
7. Attempt to proceed in garnishment to reach property not subject to garnishment ineffective for any purpose. Steven v. Ford ---------- 401
8. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
9. Market value of property includes value for any reasonable use to which it may be put. Johnson v. Nebraska Public Power Dist. ---------- 421
10. Owner may show all reasonable uses to which land adaptable and what lands are worth in view thereof. Johnson v. Nebraska Public Power Dist. ----- 421
11. Fact that jury had opportunity to inspect property of significance in determining whether verdict excessive. Johnson v. Nebraska Public Power Dist. -- 421
12. Upon appeal from county board of equalization on

ground that property value in excess of actual value, sole issue to be determined is actual value of property. Chudomelka v. Board of Equalization ----- 542

13. For purposes of taxation, terms actual value, market value, and fair market value mean exactly same thing; actual value to be determined by using applicable elements including those specified in cited statute. Chudomelka v. Board of Equalization -- 542
14. Either lay or expert witnesses may testify as to value of property if shown they have acquaintance with property and are informed as to state of market. Chudomelka v. Board of Equalization ---------- 542
15. Competency of witness to testify as to value is matter within discretion of trial court. Chudomelka v. Board of Equalization ---------- 542
16. Action to foreclose real estate mortgage may be brought within period of limitation provided by cited statute even though action on debt barred. J. I. Case Credit Corp. v. Thompson ---------- 626
17. Constitution of Nebraska does not permit taking of private property for private use. Moritz v. Buglewicz ---------- 819
18. Since action for alimony and division of property not barred by Colorado divorce decree rendered on constructive service, district court for Box Butte County, Nebraska, had jurisdiction to entertain it. Mandelberg v. Mandelberg ---------- 844
19. Rule for determination of alimony and division of property in divorce cases stated. Mandelberg v. Mandelberg ---------- 844

Prosecuting Attorneys.

Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of accused, no matter how guilty he may be. State v. Smith ---------- 152

Public Lands.

1. Tenant on school lands has compensable interest in nature of property interest in "improvements" covered by statute and placed by him on such lands prior to September 14, 1953, in accordance with statute, notwithstanding subsequent declaration of unconstitutionality of such statute for lack of due process. State v. Rosenberger ---------- 726
2. In event of sale of school lands to third person, tenant has right to compensation resulting from

"improvements" compensable under lease statutes. State v. Rosenberger ---------- 726
3. Value of tenant's interest resulting from "improvements" on school lands required to be determined prior to sale of land. State v. Rosenberger ------ 726
4. Title to school lands of this State held in trust for benefit of common schools and State required to administer them as trust property, subject to rules of law applicable to handling of trust estates. State v. Rosenberger ---------- 726

Public Officers and Employees.
1. Public officers not responsible for acts of subordinate officials, if such subordinates themselves employees of government, where no negligence on part of such public officials in employing them, unless superior officer directed, encouraged, or ratified such acts, or personally cooperated therein. Webber v. Andersen ---------- 9
2. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen ----- 9
3. Statutory plans for voluntary dissolution of school district cease to be available when district becomes subject to statute requiring mandatory dissolution by county superintendent of schools and provisions of statute invoked. Nelson v. Robertson -------- 192
4. It is presumption of law that public officers will perform their public duties. Douglas County Bank v. Department of Banking ---------- 545
5. District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners -------- 849
6. In action to establish plaintiff's alleged right to assume office of county assessor, he has burden of proving every essential element to establish his legal right to assume office. Shear v. County Board of Commissioners ---------- 849
7. Legislature has complete power and authority to prescribe qualifications for office of county assessor, limited only by requirement that such conditions of eligibility shall not be unreasonable. Shear v. County Board of Commissioners ---------- 849

Public Service Commissions.

1. Railway commission empowered to fix joint-line freight rates. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. ---------- 30
2. In fixing rates, railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. ------- 30
3. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where circumstances substantially similar. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. - 30
4. On appeal from order of railway commission fixing rates for common carriers, only questions for determination are whether or not commission acted within scope of its authority and whether or not order entered reasonable and not arbitrarily made. Howard McLean Co. v. Chicago, B. & Q. R. R. Co. - 30
5. Under Article X, section 7, Constitution of Nebraska, and cited statute, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in charging of fares by common carriers, vested in railway commission. Allen v. Omaha Transit Co., Inc. ------ 156
6. Cited statute delegates to railway commission quasi-judicial power to determine issue of unjust discrimination in charging of fares by common carriers under standards therein set out, and vests railway commission with quasi-judicial power to examine facts and determine questions of law. Allen v. Omaha Transit Co., Inc. ---------- 156
7. Generally, railway commission, in different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Allen v. Omaha Transit Co., Inc. ---------- 156
8. Cited statute requires railway commission to hold hearing on application or petition unless not opposed and disposition made by use of affidavits. Allen v. Omaha Transit Co., Inc. ---------- 156
9. Statute governing transfer of certificates of public convenience and necessity permissive in terms, not mandatory, and order of railway commission pertaining to transfer will be sustained unless appears to be unreasonable and arbitrary. Schmer v. Abler - 245
10. Generally held that necessity of obtaining approval

of railway commission to transfer certificate of public convenience and necessity does not preclude court of equity from decreeing specific performance of agreement to transfer such certificate, subject to approval by commission. Schmer v. Abler ---- 245
11. Railway commission does not have authority to determine validity of contracts for purchase of certificates of public convenience and necessity. Schmer v. Abler ---- 245
12. Existence of dispute regarding enforceability of contract for transfer of certificate of public convenience and necessity does not deprive railway commission of power to approve transfer. Schmer v. Abler -- 245
13. Railway Commission authorized to regulate rates and services and have general control of common carriers within state as Legislature may provide by law, and is not amenable to legislative interruption or limitation of its status or powers except by specific legislation. Nebraska State Railway Commission v. Chicago, & N. W. Ry. Co. ---- 369
14. Determination of what is consistent with public interest, or public convenience and necessity, one peculiarly for determination of Railway Commission; if evidence sustains findings of commission, Supreme Court cannot intervene. Nebraska State Railway Commission v. Chicago, & N. W. Ry. Co. ---- 369
15. In stock transfer proceeding under Motor Carrier Act, personal appearance of applicant at hearing not necessarily condition precedent to approval of proposed transfer by railway commission. Abler v. Herman Bros., Inc. ---- 530
16. Subject to Motor Carrier Act, determination of factors relevant to public interest in stock transfer proceeding left primarily to railway commission. Abler v. Herman Bros., Inc. ---- 530
17. In stock transfer proceeding under Motor Carrier Act, railway commission in weighing public interest possesses discretion to decide whether evidence of allied employment and noncompetition agreement necessary. Abler v. Herman Bros., Inc. ---- 530
18. On appeal to Supreme Court from order of railway commission within commission jurisdiction, questions for determination are sufficiency of evidence to support findings, adequacy of findings and conclusions to support order, and reasonableness or arbitrariness of order. Abler v. Herman Bros., Inc. ---- 530
19. Railway commission has jurisdiction to reconsider

and vacate order on own motion within 30 days after mailing of copy of order and before appeal taken; upon expiration of 30 days from mailing copy of order, or upon appeal being perfected, power of commission to reconsider order on own motion terminates. Andrews Van Lines, Inc. v. Smith ---- 533

20. Transfer of operating rights may be approved after notice and hearing if railway commission finds transaction will be consistent with public interest, does not unduly restrict competition, and applicant fit, willing, and able to perform service. Andrews Van Lines, Inc. v. Smith ---------- 533

21. Order of railway commission which fails to make findings of ultimate facts irregular and will be set aside upon appeal. Andrews Van Lines, Inc. v. Smith 533

22. Determination of what consistent with public interest peculiarly for determination of railway commission. Andrews Van Lines, Inc. v. Smith ------ 533

23. Evidence which would require finding that certificate authorizing transportation of general commodities dormant in part may not require similar finding as to such certificate authorizing transportation of household goods because of differences between two operations. Andrews Van Lines, Inc. v. Smith ---------- 533

24. When appeal taken from railway commission's denial of certificate of public convenience and necessity, only questions to be decided by Supreme Court whether commission acted within scope of its authority and if order complained of reasonable and not arbitrarily made. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

25. Under Constitution of Nebraska, railway commission has plenary power to regulate common carriers. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

26. Constitutionally created powers and duties of railway commission include regulation of rates, service, and control of common carriers. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

27. Mobile telephone service in its different aspects is form of telephone service and subject to all statutes and regulations pertaining to telephone service. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

28. Certificate of public convenience and necessity which authorizes its holder to render "telephone service" does not limit holder to practice of art of telephony as was known and practiced on date certificate

issued, nor to use therein of devices, equipment, and methods then in use. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

29. In broad sense term telephone or telephony includes entire art of speech transmission with many accessories and operating methods which research, development, and invention have supplied to facilitate and extend conversation at distance by electrical means. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

30. Object and purpose of railway commission control of common carriers to secure adequate sustained service for public at lowest reasonable cost, and to protect and conserve investments made for that purpose. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

31. Invasion of mobile telephone service company of territory of another similar company, either in service or construction, intended to be prohibited unless invading company first applies for and receives certificate of public convenience and necessity. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ------ 637

32. Duplicate lines of transportation by competing common carriers ordinarily incompatible with public interest; such competing line will be authorized only for compelling reasons. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

33. Ordinarily, new carrier cannot be certificated until existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of railway commission. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

Public Utilities.

1. Mobile telephone service in its different aspects is form of telephone service and subject to all statutes and regulations pertaining to telephone service. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. 637

2. Certificate of public convenience and necessity which authorizes its holder to render "telephone service" does not limit holder to practice of art of telephony as was known and practiced on date certificate issued, nor to use therein of devices, equipment, and methods then in use. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

3. Invasion of mobile telephone service company of territory of another similar company, either in service or construction, intended to be prohibited unless in-

vading company first applies for and receives certificate of public convenience and necessity. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ------ 637
4. Duplicate lines of transportation by competing common carriers ordinarily incompatible with public interest; such competing line will be authorized only for compelling reasons. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637
5. Ordinarily, new carrier cannot be certificated until existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of railway commission. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637

Quo Warranto.

1. District court has jurisdiction to determine plaintiff's right to assume and hold office of county assessor under plaintiff's petition for writ of mandamus praying for appropriate injunctive relief. Shear v. County Board of Commissioners -------- 849
2. In action to establish plaintiff's alleged right to assume office of county assessor, he has burden of proving every essential element to establish his legal right to assume office. Shear v. County Board of Commissioners ---------- 849

Rape.

In prosecution for rape, corroboration as to material facts and circumstances which tend to support testimony of complaining witness sufficient. State v. Garza ---------- 407

Receiving Stolen Goods.

1. In prosecution for receiving stolen property where facts known to defendant such that man of age, intelligence, and experience of defendant would know property to have been stolen, jury may properly find defendant possessed guilty knowledge. State v. Alcorn ---------- 854
2. Word "receiving" in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or apparent legal power to dispose. State v. Alcorn ---------- 854
3. In prosecution for receiving stolen property, conviction of defendant not dependent upon conviction of thief. State v. Alcorn ---------- 854

Records.

Conviction under section 28-472.03, R. S. Supp., 1969, will be affirmed where record sufficient to sustain conviction under section 28-470, R. S. Supp., 1969. State v. Smith ---------- 152

Reformation of Instruments.

Where evidence, in action for reformation of written instrument, sharply and irreconcilably conflicting, becomes necessary to apply well-known rule of equity that evidence must be clear, convincing, and satisfactory, and in consequence, deny reformation. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 342

Right to Counsel.

1. Accused not free to manipulate his right to counsel for purpose of obstructing orderly procedure or other phases of judicial administration. State v. Kirby ---------- 380
2. Counsel for accused not required to be present at time of out-of-court photographic identification, regardless of whether accused in custody or not. State v. Moss ---------- 391
3. Right of indigent to counsel does not give unbridled right to be represented by counsel of own choosing. State v. Bratton ---------- 460
4. Right of indigent to counsel cannot be manipulated so as to obstruct orderly procedure in courts or interfere with fair administration of justice. State v. Bratton ---------- 460
5. When defendant becomes dissatisfied with court-appointed counsel, unless he can show good cause to court for removal of counsel, his only alternative to proceed pro se if competent to do so. State v. Bratton ---------- 460
6. No right to counsel at pretrial photographic identification. State v. Tramble ---------- 488
7. Rule pronounced in Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387, that it is necessary to supply indigent defendant with lawyer at his preliminary hearing not retroactive. State v. Whited ---------- 592

Robbery.

1. Essential element of crime of robbery that theft be accomplished by use of force, violence, or intimidation. State v. Blunt ---------- 631

2. In crime of robbery, force relied upon must be sufficient to effect transfer of property from victim to robber and if sufficient to overcome resistance, degree is immaterial. State v. Blunt ---------- 631

Rules of Court.

Ordinarily Supreme Court will take note only of those assigned errors which are discussed. Revised Rules of Supreme Court, 1967, Rule 8a2(3). State v. Lilja 550

Schools and School Districts.

1. Under provisions of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), term "per pupil cost" means district's current operating expense for preceding year, as shown in district's annual financial report, divided by average daily membership of resident and nonresident pupils for preceding year, unless context in which term "per pupil cost" used otherwise. School Dist. of Omaha v. State Board of Education ---------- 76
2. Purpose of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), to provide formula for distribution of state aid to public school districts. School Dist. of Omaha v. State Board of Education ----- 76
3. Formula for determining base amount of state aid to different school districts in state prescribed in cited statutes. School Dist. of Omaha v. State Board of Education ---------- 76
4. Purpose of limitations set out in section 79-1341, R. S. Supp., 1967 (section 12 of L.B. 448), to equalize allocation of funds as between different school districts in state. School Dist. of Omaha v. State Board of Education ---------- 76
5. Powers of county board of equalization, under provisions of nonresident high school tuition act, ministerial only and has no standing to question discretionary legislative powers of school district. Werth v. Buffalo County Board of Equalization --- 119
6. True test in setting nonresident high school tuition rates laid down in Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729. Werth v. Buffalo County Board of Equalization ---- 119
7. County board of equalization must, in determining mill levy under provisions of nonresident high school tuition act, deduct from total requirements of fund any balance which remains after all claims for preceding fiscal year have been paid. Werth v. Buffalo

County Board of Equalization ---------- 119
8. Unless Legislature otherwise provides, funds properly expended by receiving high school district from state and federal aid includable in computation of per pupil costs under provisions of cited statute. Werth v. Buffalo County Board of Equalization -- 119
9. In action which challenges legality in whole or part of levy made under provisions of nonresident high school tuition act, receiving school districts to which tuition claims paid from fund necessary parties. Werth v. Buffalo County Board of Equalization -- 119
10. Where defeated party undertakes to perfect appeal from adverse ruling of county superintendent of schools and orders transcript in accordance with cited statute, and transcript incomplete or deficient in form, all other requirements having been met, failure to furnish proper transcript will not defeat appeal. Cherry v. Lofgren ---------- 133
11. Lemburg v. Neilsen, 182 Neb. 747, 157 N. W. 2d 381, overruled. Cherry v. Lofgren ---------- 133
12. Duly authenticated transcript of proceeding to be reviewed must be filed in district court, but if required transcript furnished and filed, deficient in form through no fault of appellant, should not defeat his right to appeal. Cherry v. Lofgren ----- 133
13. Transfer from nonaccredited school district to accredited one states sufficient reason for transfer. Bader v. Hodwalker ---------- 138
14. Statutory plans for voluntary dissolution of school district cease to be available when district becomes subject to statute requiring mandatory dissolution by county superintendent of schools and provisions of statute invoked. Nelson v. Robertson -------- 192
15. Provisions of cited statute for dissolution of school districts may not be invoked until termination of fifth school year. Nelson v. Robertson --------- 192
16. Establishment of school district boundaries purely legislative matter. Kaup v. Sweet ---------- 226
17. Courts on appeal cannot deny change of school district boundaries under statute enacted after board entered order granting change in school district boundaries under statute then in effect. Kaup v. Sweet ---------- 226
18. Petition to detach land from school district filed with board created by cited statute not pending action within meaning of general savings statute. Clark v. Sweet ---------- 232

19. Determination as to validity and sufficiency of petitions for school district reorganization filed under cited statutes made as of date petitions filed with county superintendent by county committee for school district reorganization. Virka v. Knox ---- 664
20. By its terms, cited statute provides that petitions, although presented to county committee prior to time of holding statutory public hearing, shall not be filed with county superintendent until 10 days following public hearing. Virka v. Knox -------- 664
21. County committee for school district reorganization not a governing body within ambit of cited statute. State ex rel. Medlin v. Choat ---------- 689
22. Although county superintendent of schools nonvoting member of county school district reorganization committee, must be included in maximum number permitted by cited statute. State ex rel. Medlin v. Choat ---------- 689

Searches and Seizures.

1. In passing on validity of search warrant, court may consider only information brought to attention of magistrate. Rules stated for sufficiency of affidavit of tip from informant. Affidavits for search warrants must be tested in common sense, realistic fashion. State v. Holloway ---------- 1
2. Recital of some of underlying circumstances in affidavit for search warrant essential if magistrate performs his detached function; mere affirmance of belief or suspicion not sufficient. State v. Holloway 1
3. State has burden of establishing legal sufficiency of consent to search and seizure; existence and voluntariness of consent question of fact. State v. Holloway ---------- 1
4. Consent freely and intelligently given by proper person may operate to eliminate any question otherwise existing as to propriety of search and seizure. State v. Holloway ---------- 1
5. Under stated circumstances, defendant had no standing to challenge legality of search and seizure. State v. Holloway ---------- 1
6. In warrantless search, controlling factor whether officer had reasonable grounds before search to make arrest; essential test whether facts available at moment of search would warrant man of reasonable caution to believe action taken appropriate; existence of probable cause must be determined by prac-

tical, not by any technical, standard. State v. Oltjenbruns ---------- 694
7. When materials in plain sight within motor vehicle indicative of criminal offense, subsequent search justified and legal. State v. Oltjenbruns ---------- 694

Security Interest.

Term notice in cited statute refers to actual notice and does not include constructive notice afforded by perfection and recording of security instrument. State Securities Co. v. Norfolk Livestock Sales Co., Inc. - 446

Self-Incrimination.

Accused without counsel and in custody for interrogation may effectively waive privilege against self-incrimination without receiving Miranda warnings. State v. Russo ---------- 348

Sentences.

1. Where criminal statute amended by mitigating punishment after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Goham ---------- 34
2. Purpose of kidnapping in every instance to make possible to commit some other crime; very nature therefore embraces other crimes as well as that of kidnapping. Penalties of kidnapping intentionally more severe than other crimes which may be included because of consequences which often result from its perpetration. State v. Goham ---------- 34
3. Habitual criminal act does not create new and separate criminal offense for which person may be separately sentenced; merely provides that repetition of criminal conduct aggravates guilt and justifies greater punishment than ordinarily considered. State v. Tyndall ---------- 48
4. Sentence imposed within statutory limits not disturbed for excessiveness in absence of abuse of discretion. State v. Holoubek ---------- 163
State v. Saxon ---------- 338
State v. Black Bear ---------- 670
5. Supreme Court may reduce sentence when in its opinion sentence excessive. State v. Nuss ---------- 220
State v. Keck ---------- 794
6. Standard for validity of guilty plea is whether plea represents voluntary and intelligent choice among

alternative courses of action open to defendant. State v. Cruse ---------- 331
7. Court should not correct erroneous record of criminal sentence without affording parties hearing. State v. Cruse ---------- 331
8. Discretionary with district court to hold hearing sua sponte on mental competency of defendant to undergo sentence for commission of offense. State v. Saxon ---------- 338
9. Whether defendant sentenced or placed on probation matter within discretion of trial court. State v. Gutierrez ---------- 383
10. Where sentence imposed within statutory limits, will not be disturbed in absence of abuse of discretion. State v. Gutierrez ---------- 383
State v. Escamilla ---------- 457
State v. Morosin ---------- 521
State v. Jurgens ---------- 557
State v. Williams ---------- 708
State v. Melvin ---------- 797
State v. Middleton ---------- 821
11. Statute provides that Supreme Court may reduce sentence rendered by district court against accused when in its opinion sentence excessive, in which event it renders such sentence as may be warranted by evidence. State v. Leadinghorse ---------- 386
12. Where punishment of offense created by statute left to discretion of district court to be exercised within certain prescribed limits, sentence imposed withing such limits not ordinarily disturbed where no abuse of such discretion. State v. Leadinghorse 386
State v. Andersen ---------- 605
State v. Blunt ---------- 631
State v. Jones ---------- 669
State v. Thompson ---------- 682
13. Suspension of sentence and granting of probation discretionary with trial court and in absence of abuse of discretion, trial court's determination will not be disturbed. State v. Jurgens ---------- 557
14. Sentence of imprisonment for stated period should be sufficiently certain so that accused and those charged with administering sentence may readily determine its duration. State v. Jurgens ---------- 557
15. Sentence not involving confinement preferred to sentence involving partial or total confinement in absence of affirmative reasons to contrary. State v. Shonkwiler ---------- 747

16. Statement by defendant before sentencing that Viet Nam war immoral and if drafted he would not bear arms in that war does not constitute justifiable reason for refusing probation to otherwise qualified defendant. State v. Shonkwiler ---------- 747
17. Technique for deterrence of crime is scaling of penal sanctions. State v. Keck ---------- 794
18. In passing sentence, proper for trial court to take into consideration other offenses that have been committed by accused. State v. Melvin ---------- 797

Sodomy.

1. In sex crime, testimony on direct examination concerning victim's complaint should be confined to fact that complaint was made, and details of event, including identity of person accused, not proper subjects of inquiry unless complaint spontaneous, unpremeditated statement so closely connected with act as to be part of res gestae. State v. Juarez ---- 354
2. Statement relating to startling event or condition made while declarant under stress of excitement caused by event or condition generally admissible as exception to hearsay rule, whether treated as part of res gestae or as spontaneous declaration or excited utterance. State v. Juarez ---------- 354

Specific Performance.

1. In suit where specific performance granted, all damages growing out of defendant's breach of contract litigable in specific performance action; separate subsequent actions to recover different elements of such damages for same breach cannot be maintained. Sechovec v. Harms ---------- 70
2. Generally held that necessity of obtaining approval of railway commission to transfer certificate of public convenience and necessity does not preclude court of equity from decreeing specific performance of agreement to transfer such certificate, subject to approval by commission. Schmer v. Abler ---------- 245

States.

1. Act of Congress, approved August 7, 1882, 22 U. S. Stat. at Large 341, granted State of Nebraska both civil and criminal jurisdiction of Indians in Nebraska. Robinson v. Sigler ---------- 144
2. No acceptance of public law 280 required of State of Nebraska; by its terms applied to Nebraska, and

only states not specifically mentioned required to accept its provisions if wanted to avail themselves of it. Robinson v. Sigler ---------- 144

3. A state may constitutionally charge nonresident higher tuition rate than that charged resident. Thompson v. Board of Regents of University of Nebraska ---------- 252

4. Original durational residency requirement to qualify as resident for tuition purposes constitutional. Thompson v. Board of Regents of University of Nebraska ---------- 252

5. Durational residency requirement for tuition purposes does not constitute penalty upon exercise of constitutional right of interstate travel, and such requirement tested under traditional equal protection standards. Thompson v. Board of Regents of University of Nebraska ---------- 252

6. A state has power to define resident for purposes of tuition differently than resident for other purposes. Thompson v. Board of Regents of University of Nebraska ---------- 252

7. Test of whether state statute regulating residency for tuition purposes meets traditional equal protection standards turns on whether reasonable basis for classification exists that is related to legitimate objective of state. Thompson v. Board of Regents of University of Nebraska ---------- 252

8. In area of economics and social welfare, a state does not violate equal protection clause merely because classifications made by its law imperfect; if classification has some reasonable basis, it does not offend Constitution simply because classification not made with mathematical nicety or because in practice results in some inequality. Thompson v. Board of Regents of University of Nebraska ---------- 252

9. In classifying students for purpose of charging tuition, State of Nebraska has legitimate objective of attempting to achieve partial cost equalization between those persons who have, and those who have not, recently contributed to state's economy through employment, tax payments, and expenditures within state. Thompson v. Board of Regents of University of Nebraska ---------- 252

10. State of Nebraska has valid interest in providing lower tuition charges to those who have demonstrated by continuous residency of 4 months, independent of school attendance, bona fide intention of

remaining as permanent residents and making greater contribution to state's economy and future. Thompson v. Board of Regents of University of Nebraska ---------- 252
11. Cited statute valid exercise of legislative power to classify, does not infringe upon rights protected by Article I, section 1 or 3, Constitution of Nebraska, or Fourteenth Amendment to Constitution of United States, and valid and constitutional. Thompson v. Board of Regents of University of Nebraska ----- 252

Statutes.

1. Cited statute passed for specific purpose of giving to chiefs of police powers and responsibilities to enforce law as that given to sheriffs; not for purpose of making chief of police liable for acts of subordinate policemen. Webber v. Andersen ----- 9
2. Where criminal statute amended by mitigating punishment after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Goham ---------- 34
3. Cited statute makes no requirement concerning contract between materialman and contractor; if contract and delivery, or furnishing under it, sufficient to create indebtedness or liability, sufficient to create lien. Paxton & Vierling Steel Co. v. Barmore ---- 54
4. Child custody statutes of Nebraska liberally construed to accomplish purposes of serving best interests of children involved. State v. Randall ---- 64
Healey v. Naimie ---------- 494
5. Cited statute provides that neglected child means any child in situation dangerous to life or limb or injurious to health or morals of such child. State v. Randall ---------- 64
6. Whether child neglected within purview of statute question of fact; each case determined from all facts and circumstances of each particular case. State v. Randall ---------- 64
7. In construing legislative act, resort may be had to history of its passage. School Dist. of Omaha v. State Board of Education ---------- 76
8. Statute must be given reasonable construction to accomplish objectives and purposes of act. School Dist. of Omaha v. State Board of Education ----- 76
9. Unless statute requires to contrary, findings of fact of administrative board ordinarily not set aside un-

less arbitrary, capricious, or unreasonable. School Dist. of Omaha v. State Board of Education ------ 76
10. Under provisions of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), term "per pupil cost" means district's current operating expense for preceding year, as shown in district's annual financial report, divided by average daily membership of resident and nonresident pupils for preceding year, unless context in which term "per pupil cost" used otherwise. School Dist. of Omaha v. State Board of Education ---------- 76
11. Purpose of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), to provide formula for distribution of state aid to public school districts. School Dist. of Omaha v. State Board of Education ----- 76
12. Formula for determining base amount of state aid to different school districts in state prescribed in cited statutes. School Dist. of Omaha v. State Board of Education ---------- 76
13. Purpose of limitations set out in section 79-1341, R. S. Supp., 1967 (section 12 of L.B. 448), to equalize allocation of funds as between different school districts in state. School Dist. of Omaha v. State Board of Education ---------- 76
14. Applicability of workmen's compensation statute providing attorney's fees and penalty for waiting time for delinquent payments turns largely on facts of each case. Marshall v. Columbus Steel Supply ---- 102
15. Under cited statute, when judgment over $50, attorney fees fixed at sum of $10 plus 10 percent of judgment in excess of $50. Potts v. Mahood ---- 142
16. Act of Congress, approved August 7, 1882, 22 U. S. Stat. at Large 341, granted State of Nebraska both civil and criminal jurisdiction of Indians in Nebraska. Robinson v. Sigler ---------- 144
17. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
18. No acceptance of Public Law 280 required of State of Nebraska; by its terms applied to Nebraska, and only states not specifically mentioned required to accept its provisions if wanted to avail themselves of it. Robinson v. Sigler ---------- 144
19. Constitutional provision that amendatory act con-

tain section amended not applicable to independent act complete in itself. State v. Greenburg 149
20. Constitutional provision applicable to act not complete in itself, but relates to other existing statutes by changing them in part so that changes and existing provisions result in connected piece of legislation covering same subject matter. State v. Greenburg 149
21. Chapter 197, Laws 1969, declared unconstitutional as in violation of Article III, section 14, Constitution of Nebraska. State v. Greenburg 149
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54. To justify conviction on circumstantial evidence, necessary that facts and circumstances essential to conclusion sought be proved by competent evidence beyond reasonable doubt, and when taken together must be of such character as to be consistent with each other and with hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Eickmeier - 491
55. After jury has considered evidence in light of circumstantial evidence rule and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Eickmeier ---------- 491
56. When fact in issue may be explained by production of article or object to which testimony relates, proper to produce such object or article and exhibit it to jury. State v. Eickmeier ---------- 491
57. Evidence of crime, like one charged against an accused, admissible if tends to prove particular criminal intent necessary to constitute crime charged. State v. Moore ---------- 498
58. Whether other crimes too remote determinable by exercise of judicial discretion; limits of discretion set by facts of each case. State v. Moore ---------- 498
59. Litigant who knowingly and deliberately assumes particular position in judicial proceeding, generally estopped to take position inconsistent therewith to prejudice of adverse party. Brander v. Eagle Raceways, Inc. ---------- 508
60. Policy of insurance given effect according to ordinary sense of terms used, and if clear, will be applied according to their plain and ordinary meaning. Brander v. Eagle Raceways, Inc. ---------- 508
61. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis ---------- 522
62. Where motion for new trial presents questions of fact concerning regularity of jury's deliberations, trial court becomes trier of disputed facts with ref-

erence thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Winston v. Davis ---------- 522

63. In stock transfer proceeding under Motor Carrier Act, personal appearance of applicant at hearing not necessarily condition precedent to approval of proposed transfer by railway commission. Abler v. Herman Bros., Inc. ---------- 530

64. Subject to Motor Carrier Act, determination of factors relevant to public interest in stock transfer proceeding left primarily to railway commission. Abler v. Herman Bros., Inc. ---------- 530

65. In stock transfer proceeding under Motor Carrier Act, railway commission in weighing public interest possesses discretion to decide whether evidence of allied employment and noncompetition agreement necessary. Abler v. Herman Bros., Inc. ---------- 530

66. Foundation for admission into evidence of body fluid test showing compliance with provisions of cited statute sufficient. State v. Lilja ---------- 550

67. Evidence of commission of other crimes than one for which defendant being tried incompetent, irrelevant, and immaterial, and ordinarily prejudicial to rights of defendant. State v. Murray ---------- 554

68. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused charged, even though such facts and circumstances may prove or tend to prove defendant committed other crimes. State v. Murray ---------- 554

69. Delivery of life insurance policy and acceptance of premiums raise presumption that all conditions precedent such as continued insurability met; this presumption sufficient to sustain plaintiff's burden of proof unless defendant introduces evidence to rebut it. Ortega v. North American Co. for L. & H. Ins. 569

70. Where evidence introduced by insurer wholly insufficient to rebut presumption that plaintiff in good health at date of issuance of policy, error for trial court to submit such issues to jury. Ortega v. North Amercian Co. for L. & H. Ins. ---------- 569

71. If plaintiff without reasonable explanation testifies to facts materially different from his deposition concerning vital issue, change clearly being made to meet exigencies of pending action, evidence discredited and should be disregarded. Beshaler v. Helberg 584

72. Rule announced in United States v. Wade, 388 U. S.

218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, that in-court identification inadmissible if tainted by improper prior lineup or confrontation not retroactive. State v. Whited ---------- 592

73. Intent to cheat and defraud may be proved by circumstances surrounding transaction. State v. Bohannon ---------- 594

74. Rule stated when negligence imputed to owner who is passenger in own automobile and operated by another; ordinarily question for jury unless evidence so conclusive that minds of men could not reasonably arrive at any other conclusion, then question one for decision by court as matter of law. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606

75. Where evidence clear that only person within class for which action may be brought under cited statute guilty of negligence as matter of law, duty of court to direct verdict for defendant. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 606

76. Special findings by district court ordinarily unnecessary unless party requests them with view of excepting to decision of court upon question of law involved in trial. Bailey v. McCoy ---------- 618

77. District court may determine any controversy between parties before it, when can be done without prejudice to rights of others, or by saving their rights; but when determination of controversy cannot be had without presence of other parties, court must order them brought in. Bailey v. McCoy ---------- 618

78. What is public good as relates to zoning ordinances affecting use of property primarily matter lying within discretion and determination of municipal body to which power and function of zoning committed; unless abuse of discretion clearly shown, not province of courts to interfere. J. W. Auto Parts, Inc. v. City of Omaha ---------- 624

79. Rule for consideration of motion for judgment notwithstanding verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648

80. Rule for consideration of motion for directed verdict stated. Schleusener v. Nebraska Tractor & Equipment Co. ---------- 648

81. Jury instructions must be considered collectively; if as whole they correctly state law, no error occurs, although one alone may be incomplete. State v. Black Bear ---------- 670

82. No formal offer to prove required to obtain review

of ruling of trial court excluding answer of witness to question, where question itself clearly indicates what party expected to prove by witness. George Rose Sodding & Grading Co., Inc. v. City of Omaha 683

83. Failure to instruct jury to return verdict for nominal damages in action for trespass, where defendant admitted trespass, error. George Rose Sodding & Grading Co., Inc. v. City of Omaha ---------- 683

84. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686

85. Function of prosecutor's opening statement to generally state nature of case; within discretion of prosecutor how much or how little to comment specifically upon evidence to be offered. State v. Oltjenbruns ---------- 694

86. Question leading when so framed as to suggest to witness answer which is desired of him; conversely, question not leading where does not in any way indicate or suggest answer desired. State v. Hoffmeyer ---------- 701

87. Trial court in criminal case has large, though not unlimited, discretion in granting or refusing permission to ask witness leading question; discretion legal one and subject to proper limitations. State v. Hoffmeyer ---------- 701

88. As general rule, evidence of other crimes not admissible to prove guilt of defendant of particular crime charged; are exceptions, however, to rule; such evidence relevant and admissible if tends to prove particular criminal intent which is necessary to constitute crime charged. State v. Hoffmeyer -- 701

89. Rule stated as to duties of driver approaching unprotected intersection at speed as will afford reasonable opportunity for effective observations for cars approaching on intersecting road or when view completely obstructed. Where facts undisputed, negligence may be found as matter of law. Hodgson v. Gladem ---------- 736

90. In absence of request for cautionary instruction with relation to previous similar offenses, not error for trial court to fail to give such instruction. State

v. Randall ---------- 743
91. Trial court's finding that in-custody statement of accused voluntary must appear from record with unmistakable clarity. State v. McDonald ---------- 752
92. To be admissible, confession must be free and voluntary, that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by exertion of any improper influence. State v. McDonald ---- 752
93. Duty of court not only to instruct as to what constitutes voluntary confession, but also to instruct jury to disregard alleged confession if found to be involuntary. State v. McDonald ---------- 752
94. Not proper to allow attorney's fee in criminal cases only for time spent in trial and refuse allowance for time or services reasonably and necessarily required and performed prior to trial. State v. McDonald ---------- 752
95. In prosecution for larceny in Nebraska, lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence. State v. Simons ---------- 761
96. Standards Relating to Pleas of Guilty promulgated by American Bar Association outline what should be minimum procedure in taking of pleas of guilty. State v. LeGear ---------- 763
97. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. LeGear ---------- 763
98. Trial court may not rely upon generalized admissions or statements by defense counsel as method for determining is factual basis for plea of guilty. State v. LeGear ---------- 763
99. Extent to which witness on redirect examination may explain testimony elicited on cross-examination lies primarily in discretion of trial court. State v. Fellman ---------- 767
100. In criminal prosecution where State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination limited. State v. Fellman ---------- 767
101. No denigration of right to trial to hold when defendant waives his state court remedies and admits guilt, he does so under law then existing; further, he assumes risk of ordinary error in either his or his attorney's assessment of law and facts. State v. Bevins ---------- 785

102. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were principal offender. State v. Cook ---------- 788
103. Party must plead and prove existence of municipal ordinance in order to have benefit of ordinance. Heavican v. Holbrook ---------- 814
104. Correctness of ruling of district court in giving or refusing instructions cannot be considered by Supreme Court unless such ruling first challenged in district court by motion for new trial. State v. Middleton ---------- 821

Trusts.

Title to school lands of this state held in trust for benefit of common schools and State required to administer them as trust property, subject to rules of law applicable to handling of trust estates. State v. Rosenberger ---------- 726

United States.

1. Act of Congress, approved August 7, 1882, 22 U. S. Stat. at Large 341, granted State of Nebraska both civil and criminal jurisdiction of Indians in Nebraska. Robinson v. Sigler ---------- 144
2. Power of Congress over Indian affairs plenary and cannot be limited by treaty. Robinson v. Sigler -- 144
3. Inherent police power of states applies both to Indians and to Indian country, except to extent that federal government preempted field, and therefore federal government may withdraw from field and turn jurisdiction back to states when chooses to do so. Robinson v. Sigler ---------- 144
4. No acceptance of Public Law 280 required of State of Nebraska; by its terms applied to Nebraska, and only states not specifically mentioned required to accept its provisions if wanted to avail themselves of it. Robinson v. Sigler ---------- 144

Utilities.

1. In order to find provision of Constitution restricts plenary power of Legislature to tax Metropolitan Utilities District, language of restriction must be clearly applicable. Evans v. Metropolitan Utilities Dist. ---------- 261
2. Public corporation authorized by Legislature and

organized pursuant thereto to carry out functions determined for public purpose and general welfare of people is arm or branch of government for this purpose and under plenary control of Legislature. Evans v. Metropolitan Utilities Dist. ---------- 261

Venue.

1. Motion for change of venue in criminal case addressed to sound discretion of trial court; its ruling thereon not disturbed unless abuse of such discretion disclosed. State v. Goham ---------- 34
   State v. Klatt ---------- 274
2. Plea of guilty, voluntarily entered, waives any objection to overruling of motion for change of venue. State v. Hamilton ---------- 359
3. Request for change of venue in criminal case addressed to sound discretion of trial court, and its ruling thereon will not be disturbed unless abuse of discretion shown. State v. Hoffmeyer -------- 701

Verdict.

1. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Hacker v. Perez ---------- 485
2. After jury has considered evidence in light of circumstantial evidence rule and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Eickmeier ---------- 491
3. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake, or clear that jury disregarded evidence or controlling rules of law. Winston v. Davis ---------- 522
4. Where party has sustained burden and expense of trial and succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless prejudicial error in proceedings by which it was secured. Beshaler v. Helberg ---- 584
5. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Alcorn 854

Waiver.

Defendant may waive constitutional right or guarantee provided done so knowingly and voluntarily. State v. Hatten ---------- 237

Wills.

1. In action for construction of will, extrinsic evidence admissible to show attendant circumstances under which will made and to enable court to place itself in situation of testator. Hays v. Johnson ------- 307
2. Evidence as to property of deceased, its value, its distribution under will, costs and expenses of administration, and estate taxes paid by executrix sufficient to sustain determination of inheritance tax liability of estate. Reller v. McArthur ------ 313
3. Where real estate sold pursuant to general power of sale contained in will, judgment creditor of beneficiary of estate has no lien upon property sold or proceeds of sale. Steven v. Ford ---------- 401
4. Codicil may alter, enlarge, or restrain provisions of will; distinguishing feature is addition to or qualification of will. Flint v. Panter ---------- 615
5. Notice that will and codicil being offered for probate sufficient to put party receiving notice upon inquiry to determine what documents being offered for probate. Flint v. Panter ---------- 615

Witnesses.

1. In order to deny claim to privilege against self-incrimination by witness, must be perfectly clear to trial judge, from careful consideration of all circumstances in case, that witness mistaken and answer or answers cannot possibly tend to incriminate. State v. Holloway ---------- 1
2. Rule is that new trial not granted on grounds of newly discovered evidence when only effect of evidence to impeach or discredit witness. State v. Goham ---------- 34
3. Before witness permitted to testify as to testimony of witness at former trial, must be shown that witness able to recall and relate substance of entire testimony upon subject or topic involved. State v. Christiansen ---------- 73
4. Party calling witness does not vouch for credibility of witness. Conn v. ITL, Inc. ---------- 112
5. Testimony by expert witness as to weight of exhibit weighed on laboratory scale admissible with-

out prior evidence as to accuracy of scale. State v. Smith ---------- 152
6. In prosecution for burglary, witness who only receiver of stolen property or accessory after the fact not accomplice of defendant. State v. Holoubek -- 163
7. General rule as to opinion of lay witness that witness may testify only to facts perceived by his senses and may not give opinion or conclusion. Shamburg v. Folkers ---------- 169
8. Lay witness may testify to relevant opinion based upon facts perceived by him if opinion of kind normally formed by person constantly and correctly and witness cannot accurately, adequately, or with reasonable facility describe fundamental facts upon which opinion based; in substance such process under these circumstances description. Shamburg v. Folkers ---------- 169
9. Unnecessary to repeat same objection to further testimony of same nature by same witness in order to save error; however, failure to object to identical or substantially same incompetent testimony by another witness waives erroneous ruling in admission of testimony of first witness. Shamburg v. Folkers ---------- 169
10. Resolution of conflicts and inconsistencies in testimony of witness question of fact for jury; jury's function to determine which, if any, of inconsistent statements of witness is true. State v. Ford ------ 353
11. Where question asked of witness, and answer responsive to question and received without objection, and motion then made by counsel to strike out such evidence on ground of incompetency, discretionary with court whether to sustain motion or not. State v. Masek ---------- 358
12. Conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification; each case must be considered on own facts. State v. Moss ---------- 391
13. Failure to require opinion of medical expert witness be based upon reasonable medical certainty not prejudicial where witness testified to objective findings and answer expressed positive opinion. State v. Garza ---------- 407
14. Weight and credibility of testimony of both lay and

expert witnesses as to amount of damages sustained by landowner peculiarly of local nature to be decided by jury; verdict will not be overturned if based on testimony. Johnson v. Nebraska Public Power Dist. ---------- 421

15. Asking of improper questions of witness to which objections sustained by court not prejudicial error in absence of showing that defendant thereby deprived of fair and impartial trial. State v. Escamilla ---------- 457

16. Primary factor in determining whether independent basis for in-court identification exists is opportunity afforded witness to observe defendant under circumstances free from taint. State v. Evans ---------- 474

17. Not province of Supreme Court to pass on credibility of witnesses or weigh evidence in criminal case. State v. Walker ---------- 482
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18. Either lay or expert witnesses may testify as to value of property if shown they have acquaintance with property and are informed as to state of market. Chudomelka v. Board of Equalization ---------- 542

19. Competency of witness to testify as to value is matter within discretion of trial court. Chudomelka v. Board of Equalization ---------- 542

20. No formal offer to prove required to obtain review of ruling of trial court excluding answer of witness to question, where question itself clearly indicates what party expected to prove by witness. George Rose Sodding & Grading Co., Inc. v. City of Omaha 683

21. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Keenan v. Keenan ---------- 686

22. Question leading when so framed as to suggest to witness answer which is desired of him; conversely, question not leading where does not in any way indicate or suggest answer desired. State v. Hoffmeyer ---------- 701

23. Trial court in criminal case has large, though not unlimited, discretion in granting or refusing permission to ask witness leading question; discretion legal one and subject to proper limitations. State

v. Hoffmeyer ---------- 701
24. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Simons ---------- 761
25. Extent to which witness on redirect examination may explain testimony elicited on cross-examination lies primarily in discretion of trial court. State v. Fellman ---------- 767
26. In criminal prosecution where State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination limited. State v. Fellman ---------- 767
27. Credibility of witnesses and weight of evidence for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless clearly wrong. State v. Middleton ---------- 821

Words and Phrases.

1. Relation of master and servant cannot be defined in general terms with substantial accuracy. Todd v. Boals ---------- 51
2. Under provisions of L.B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), term "per pupil cost" means district's current operating expense for preceding year, as shown in district's annual financial report, divided by average daily membership of resident and nonresident pupils for preceding year, unless context in which term "per pupil cost" used otherwise. School Dist. of Omaha v. State Board of Education ---------- 76
3. Word "airport" in clause "any city * * * owning or operating an airport" in Cities Airport Authorities Act, means airport qualified and licensed for public use. Elliott v. City of Plattsmouth ---------- 165
4. "Municipal corporations," as used in Article VIII, section 7, Constitution of Nebraska, refers to municipal corporations in strict and legal sense of those which exercise governmental functions, as distinguished from proprietary functions. Evans v. Metropolitan Utilities Dist. ---------- 261
5. Trailer which is used as office may be subject of burglary under cited statute. State v. Warner --- 335
6. In automobile liability insurance policy, word household in omnibus clause extending liability available to insured to other members of household means

those who dwell under same roof and compose a family. State Farm Mut. Auto. Ins. Co. v. Selders - 342
7. When one knows that dangerous condition exists, appreciates its dangerous nature and deliberately exposes himself to such danger, he assumes risk of injury from it. Jeffrey v. Retzlaff ---------- 372
8. Term "unlawfully" word of common usage and as such need not be specifically defined in instruction or statute. State v. Neal ---------- 413
9. Term notice in cited statute refers to actual notice and does not include constructive notice afforded by perfection and recording of security instrument. State Securities Co. v. Norfolk Livestock Sales Co., Inc. ---------- 446
10. Lesser included offense one which includes some of elements of crime charged without addition of any element irrelevant to crime charged. State v. Escamilla ---------- 457
11. For purposes of taxation, terms actual value, market value, and fair market value mean exactly same thing; actual value to be determined by using applicable elements including those specified in cited statute. Chudomelka v. Board of Equalization --- 542
12. In construing writing, words used should be given their ordinary and popularly accepted meaning in absence of explanation or qualification. Rogers v. Neiman ---------- 582
13. Provision in lease granting lessee option to purchase in event "the lessors shall place the premises up for sale" does not apply to sale of undivided interest in premises by one lessor to another lessor. Rogers v. Neiman ---------- 582
14. In service partnership agreement with provision that partners base payment for good will on annual income, word "income" ordinarily imports net profits. Bailey v. McCoy ---------- 618
15. In broad sense term telephone and telephony includes entire art of speech transmission with many accessories and operating methods which research, development, and invention have supplied to facilitate and extend conversation at distance by electrical means. Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc. ---------- 637
16. Concealment, within meaning of cited statute, simply means any possession of goods in such manner as to keep them from rightful owner and intent to deprive owner of his property. State v. Oltjenbruns 694

17. Question leading when so framed as to suggest to witness answer which is desired of him; conversely, question not leading where does not in any way indicate or suggest answer desired. State v. Hoffmeyer ---------- 701
18. Habeas corpus is writ of right but not writ of course, and probable cause for its allowance must be shown. Middlebrook v. Sigler ---------- 705
19. Applicable part of "full reporting" clause in defendant's policy of provisional fire insurance issued to plaintiff construed to limit liability to that proportion of any loss which last reported value bears to actual value at time of report, provided liability does not exceed amount stated in schedule endorsement of policy. Nile Valley Coop. G. & M. Co. v. Farmers Elevator Mut. Ins. Co. ---------- 720
20. Judicial sale advertised for front door of courthouse may be held at front of steps on first floor inside courthouse. Hollstein v. Adams ---------- 781
21. If publication day falls upon holiday, publication preceding day in weekly newspaper complies with statutory requirement that publication be had upon same day of week as first publication. Hollstein v. Adams ---------- 781
22. Chapter 57, article 9, R. R. S. 1943, contemplates that determination of correlative rights of adjoining owners in pool of oil or gas shall be determined on fair, reasonable, and equitable basis. Farmers Irr. Dist. v. Schumacher ---------- 825
23. Word "receiving" in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or apparent legal power to dispose. State v. Alcorn ---------- 854

Workmen's Compensation.

1. Requirement that objective symptoms of injury be produced "at the time" of accident satisfied if symptoms manifest themselves according to natural course of such matters without any independent intervening cause shown. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
2. Workmen's Compensation Act does not require objective symptoms of injury produced at time of accident be observed by others or their existence be proved by independent testimony. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57
3. On appeal of workmen's compensation case to Su-

preme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57

4. Upon appellate review of workmen's compensation case in Supreme Court, cause considered de novo only where findings of fact not supported by evidence as disclosed by record. Gifford v. Ag Lime, Sand & Gravel Co. ---------- 57

5. Applicability of workmen's compensation statute providing attorney's fees and penalty for waiting time for delinquent payments turns largely on facts of each case. Marshall v. Columbus Steel Supply _ 102

6. Workmen's compensation claimant, unaided by presumption, bears burden of proof that his employment in fact caused compensable injury. Conn v. ITL, Inc. ---------- 112

7. Workmen's compensation claimant with atherosclerosis which was personal risk and cause of otherwise compensable injury may recover under these circumstances: Employment risk greater than that of ordinary nonemployment life was cause of injury. Conn v. ITL, Inc. ---------- 112

8. Losses in bodily function are important only insofar as they relate to earning capacity and loss thereof. Shotwell v. Industrial Builders, Inc. ---------- 320

9. Disability defined in terms of employability and earning capacity rather than in terms of loss of bodily function. Shotwell v. Industrial Builders, Inc. ---------- 320

10. When employee's injuries caused by willful negligence, may not recover compensation. Bole v. S. M. S. Trucking Co. ---------- 341

11. On appellate review of workmen's compensation case in Supreme Court, it will not be considered de novo if findings of fact are supported by evidence. Bole v. S. M. S. Trucking Co. ---------- 341

12. General test in determining whether employee servant of original master, or of party to whom has been furnished, whether in particular service which he is engaged to perform he continues to be liable to direction and control of master, or becomes subject to that of party to whom he is lent or hired. Mid-America Pipeline Co. v. Warren ---------- 710

13. Rule stated as to relationship of employee between original master and new master to whom loaned.

Mid-America Pipeline Co. v. Warren ---------- 710
14. Before new relationship from original master to new master can be made effective, servant must understand he is submitting himself to control of new master. Mid-America Pipeline Co. v. Warren ----- 710
15. In workmen's compensation proceeding, district court finding against party will be set aside if evidence compels finding for that party. Adler v. Jerryco Motors, Inc. ---------- 757
16. Under Workmen's Compensation Act, recreational or social activities within course of employment when employer derives substantial direct benefit from activity beyond intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. Adler v. Jerryco Motors, Inc. ---------- 757

Zoning.

1. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. City of Imperial v. Raile ---------- 404
2. Municipal corporation cannot be estopped from enforcing valid ordinance, and injunction proper remedy to prevent continuing violation of lawful zoning ordinance. City of Imperial v. Raile ---------- 404
3. What is public good as relates to zoning ordinances affecting use of property primarily matter lying within discretion and determination of municipal body to which power and function of zoning committed; unless abuse of discretion clearly shown, not province of courts to interfere. J. W. Auto Parts, Inc. v. City of Omaha ---------- 624